

**October 2013**

**TABLE OF CONTENTS**

**COMMISSION ORDERS**

10-31-2013	WELDON STACKINS, employed by TENNESSEE MATERIALS CORP.	SE 2012-104-M	<a href="#">Page 3249</a>
10-31-2013	AMEC EARTH & ENVIRONMENTAL, INC.	WEST 2012-532-M	<a href="#">Page 3252</a>
10-31-2013	O & M INDUSTRIES	WEST 2012-766-M	<a href="#">Page 3255</a>
10-31-2013	GUDELSKY MATERIALS	YORK 2011-51-M	<a href="#">Page 3258</a>

**ADMINISTRATIVE LAW JUDGE DECISIONS**

10-23-2013	MAXXIM REBUILD COMPANY, LLC	KENT 2013-566	<a href="#">Page 3261</a>
10-25-2013	PRAIRIE STATE GENERATING CO.	LAKE 2009-711-R	<a href="#">Page 3272</a>
10-25-2013	J. SANTORO, INC.	YORK 2011-257-M	<a href="#">Page 3278</a>
10-28-2013	IKERD MINING CO., LLC	KENT 2012-242	<a href="#">Page 3302</a>
10-28-2013	COLE PILLING, employed by TM CRUSHING	WEST 2013-161-M	<a href="#">Page 3316</a>

**ADMINISTRATIVE LAW JUDGE ORDERS**

10-25-2013	GREYEAGLE COAL COMPANY	WEVA 2012-664	<a href="#">Page 3321</a>
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Review was granted in the following cases during the month of October 2013:

Warrior Coal, LLC v. Secretary of Labor, MSHA, Docket Nos. KENT 2011-1259-R, KENT 2011-1260-R, KENT 2012-705. (Judge Steele, September 4, 2013)

Secretary of Labor, MSHA v. The American Coal Company, Docket Nos. LAKE 2011-, LAKE2011-881, LAKE 2011-962, LAKE 2012-58. (Judge Lewis, September 20, 2013)

Secretary of Labor, MSHA v. Sunbelt Rentals, Inc.; LVR, Inc.; and Roanoke Cement Co., LLC, Dockets Nos. VA 2013-275, VA 2013-276, VA2013-291. (Judge McCarthy, September 24, 2013)

Review was denied in the following cases during the month of October 2013:

Secretary of Labor, MSHA v. Veris Gold USA, Inc., Formerly Queenstake Resources, USA, Docket Nos. WEST 2013-M, WEST 2013-357-M. (Judge Miller, September 5, 2013)

Secretary of Labor, MSHA v. Oak Grove Resources, et al., Docket Nos. SE 2010-828, SE 2012-306, SE 2012-308. (Judge Zielinski, September 18, 2013)

# **COMMISSION ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

October 31, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2012-104-M
v.	:	A.C. No. 40-03106-270562 A
	:	
WELDON STACKINS, employed by	:	
TENNESSEE MATERIALS CORP.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 9, 2013, the Commission received from a representative of Weldon Stackins (“Stackins”), a former employee of Tennessee Materials Corp. (“Tennessee Materials”), a motion seeking to reopen a penalty assessment proceeding and relieve him from the default order entered against him.

On July 24, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if Stackins did not file an answer within 30 days. This Show Cause Order was issued in response to Stackins’ failure to answer the Secretary’s January 12, 2012 Petition for Assessment of Civil Penalty.

Stackins asserts that he terminated his employment with Tennessee Materials in March 2010, and that Tennessee Materials never forwarded any mail to him despite his attempts to obtain information regarding this case. Stackins states that he learned of the delinquency upon Tennessee Materials’ filing for bankruptcy, after being contacted by a Department of Treasury collection agency. The Secretary does not oppose the request to reopen, and notes that all documents were mailed to Stackins at the Tennessee Materials’ address.

Pursuant to Commission Procedural Rule 66, an order to show cause shall be mailed to the party by registered or certified mail, return receipt requested, before the entry of any order of default or dismissal. 29 C.F.R. § 2700.66. Having reviewed Stackins' request and the Secretary's response, we conclude that Stackins did not receive the penalty petition and Show Cause Order, and therefore a Default Order has not been effectively entered. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

October 31, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-532-M
v.	:	A.C. No. 26-00550-270258 P8D
	:	
AMEC EARTH & ENVIRONMENTAL, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 13, 2013, the Commission received from AMEC Environment & Infrastructure, Inc., formerly AMEC Earth & Environmental, Inc., (“AMEC”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On October 4, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to AMEC’s failure to answer the Secretary’s March 2, 2012 Petition for Assessment of Civil Penalty.

AMEC asserts that it did not receive the penalty petition nor the Show Cause Order because they were mailed to its old address. AMEC further states that it discovered the error after receiving a Substitution of Counsel letter which was mailed to its new address. The Secretary does not oppose the request to reopen, and confirms that both the penalty petition and the Show Cause Order were sent to AMEC’s old address and returned undelivered.

Pursuant to Commission Procedural Rule 66, an order to show cause shall be mailed to the party by registered or certified mail, return receipt requested, before the entry of any order of default or dismissal. 29 C.F.R. § 2700.66. Having reviewed AMEC's request and the Secretary's response, we conclude that the operator did not receive the penalty petition and Show Cause Order, and therefore a Default Order has not been effectively entered. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

October 31, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-766-M
v.	:	A.C. No. 04-04075-284283 LGH
	:	
O & M INDUSTRIES	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 15, 2013, the Commission received from O & M Industries (“O&M”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On November 1, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to O&M’s failure to answer the Secretary’s May 7, 2012 Petition for Assessment of Civil Penalty.

O&M asserts that it never received the penalty petition or Show Cause Order because they were mailed to an old address. O&M states that it learned of the delinquency after mistakenly paying it, thinking it was a different case. The Secretary does not oppose the request to reopen and acknowledges that the penalty petition and Show Cause Order were mailed to an outdated address.

Pursuant to Commission Procedural Rule 66, an order to show cause shall be mailed to the party by registered or certified mail, return receipt requested, before the entry of any order of default or dismissal. 29 C.F.R. § 2700.66. Having reviewed O&M's request and the Secretary's response, we conclude that the operator did not receive the penalty petition and Show Cause Order, and therefore a Default Order has not been effectively entered. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura  
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/s/ William I. Althen  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

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October 31, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2011-51-M
v.	:	A.C. No. 18-00728-238497
	:	
GUDELSKY MATERIALS	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 16, 2013, the Commission received from Gudelsky Materials (“Gudelsky”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On January 5, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Gudelsky’s perceived failure to answer the Secretary’s January 7, 2011 Petition for Assessment of Civil Penalty.

Gudelsky asserts that it did not receive the Show Cause Order and that it discovered the delinquency upon checking MSHA’s Data Retrieval System. The record indicates that the Show Cause Order was returned to the Commission as undelivered. The Secretary does not oppose the request to reopen, and notes that MSHA received a timely answer to the penalty petition dated January 27, 2011. The Secretary states that MSHA mailed a delinquency notice on June 14, 2012, which was returned undelivered, and referred the case to the Department of Treasury for collection on August 2, 2012. The Secretary further notes that Gudelsky contacted MSHA regarding the delinquency on September 5, 2012, and paid the penalty through the Department of Treasury on January 17, 2013.

The Secretary asserts that all documents were mailed to Gudelsky’s address of record in Chantilly, Virginia. If mail cannot be delivered to this address, it is the operator’s responsibility to contact MSHA and the Commission to update its address of record.

Pursuant to Commission Procedural Rule 66, an order to show cause shall be mailed to the party by registered or certified mail, return receipt requested, before the entry of any order of default or dismissal. 29 C.F.R. § 2700.66. Having reviewed Gudelsky's request and the Secretary's response, we conclude that the operator did not receive the Show Cause Order, and therefore a Default Order has not been effectively entered. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
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/s/ Patrick K. Nakamura  
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# **ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19th STREET, SUITE 443  
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October 23, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2013-566
Petitioner,	:	A.C. No. 15-10753-314453 F457
	:	
v.	:	
	:	
MAXXIM REBUILD COMPANY, LLC,	:	
Respondent.	:	Mine: Mine #1

**DECISION**

Appearances: Mary Sue Taylor, Office of the Solicitor, U.S. Department of Labor, Nashville, TN on behalf of the Secretary of Labor;  
R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, PA on behalf of Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) against Maxxim Rebuild Company, LLC, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The docket involves three citations issued by MSHA under section 104(a) of the Mine Act at Maxxim’s fabrication shop at Mine No. 1, located in Sidney, Kentucky. Maxxim, in addition to disputing the violations, also disputes that MSHA has jurisdiction over this facility. The parties presented testimony and evidence at a hearing held on July 17, 2013 in Lexington, Kentucky.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Maxxim Rebuild, a subsidiary, or affiliate, of Alpha Natural Resources, owns and operates seven facilities in six locations in Kentucky and West Virginia. Prior to its affiliation with Alpha, Maxxim was owned by Massey Energy.

The facility addressed in the violations is a maintenance shop that repairs, rebuilds and fabricates mining equipment and parts for mining equipment. While the facility fabricates some additional parts for non-mining related purposes, the majority of the parts are used in mining equipment. The facility employs eight individuals, including one who travels to the mines, and includes two work bays in the shop area; one for welding, and one for fabrication.

Prior to January 2012 the Maxxim facility was located in Matewan, West Virginia. While located in West Virginia, the facility was not being inspected by MSHA. In January of 2012 the facility was relocated to a site in Kentucky that had previously been operated by Clean

Energy, also an Alpha affiliate, which had closed its operation and abandoned the site. Before Maxxim took over occupancy of the abandoned Kentucky site, the shop area was modified and updated. Further, at that time, engineers for Sidney Coal, also an Alpha company, occupied the upstairs offices in the building at the site.

Several of the Maxxim shops are inspected by MSHA and others are inspected by OSHA. This facility has been inspected twice since Maxxim took over occupancy of the Kentucky site. The first inspection resulted in two violations. The second inspection resulted in the three citations at issue in this docket. The shop facility includes a warehouse, which stores at least one piece of equipment for Alpha.

While Maxxim asserts that it is an “affiliate” of Alpha, and not subject to Mine Act jurisdiction, the Secretary contends that the facility is a wholly owned subsidiary of Alpha, and is within the jurisdiction of the Act. For the reasons that follow, I find that MSHA has jurisdiction in this matter and that Maxxim violated the standards as alleged.

*a. Jurisdiction*

Maxxim asserts that the Secretary does not have jurisdiction in this matter because the facility is not a “mine” as contemplated by the Act, its activities are too remote from the mining process, the facility repairs and rebuilds mining equipment for entities other than Alpha Natural Resources, and MSHA has inconsistently applied jurisdiction over the site and similarly situated repair shops. Contrarily, the Secretary argues that, due to the nature of the work performed at the facility, it is a “mine” and, accordingly, is within the jurisdictional reach of the Act.

The Maxxim rebuild shop repairs equipment that is used primarily in Alpha Natural Resources mines, but, in limited circumstances, has repaired equipment for non-Alpha mines. Maxxim’s regional safety director oversees all Maxxim shops and works out of Alpha’s headquarters. In the past year, the Alpha mines have provided enough work such that Maxxim has only done work for Alpha. Prior to relocating to the Kentucky site, the facility worked only for Massey Energy mines.

In addition to conducting repair work, the facility also fabricates parts for equipment. Most of the parts are used by Alpha mines, however, roughly 25% of the fabricated parts are sent to other Maxxim shops. Of that amount, a portion of the parts are sold either to mining operations or other businesses that use heavy equipment. (Tr. 44-45). While Maxxim repairs and fabricates equipment and parts for both underground and surface mines, it recently has had a surge in work for underground mines.

Maxxim presented testimony that MSHA had stopped inspecting the fabrication shop when it was located in West Virginia, after the mining operation had been abandoned and only the shop remained. Maxxim represents that MSHA had not inspected the West Virginia facility for two or three years prior to the facilities move to Sidney, Kentucky. Before moving the facility, the Maxxim manager had a number of conversations about MSHA jurisdiction with Alpha managers and he was told that, since Clean Energy, the operator of the Kentucky site, was in abandoned status, the shop would not be subject to MSHA inspection. There is no indication

that anyone at MSHA told the shop they would not be inspected and, rather, it appears that the information came from the higher ranks at Alpha. Additionally, Randall Canterbury, the manager for this Maxxim location, explained that given the machines, welders, drills and fabrication equipment used in the shop, the OSHA standards are more appropriate for the facility since the equipment is not specific to mining and can be used in any industry. Further, Maxxim argues that, because the shop works for a handful of mines other than Alpha, and moves approximately 25% of its fabricated parts to other shops who may sell them to non-Alpha mines and non-mines, it is exempt from MSHA inspection.

MSHA does not dispute that the producing mine at the Maxxim site has been sealed and abandoned, but argues instead that it is the nature of the work at the shop that places it in MSHA jurisdiction. Maxxim did not speak with MSHA about jurisdiction, but its overall safety manager, Martin, did explain that, while five of the Maxxim facilities are under OSHA jurisdiction, two are under MSHA, including this Sidney location and he believed this shop would be inspected by OSHA. The other shop subject to MSHA jurisdiction is on mine property, adjacent to the prep plant in Sidney.

Section 4 of the Mine Act, 30 U.S.C. § 803, provides that each “coal or other mine” is subject to the provisions of the Act. “Coal or other mine” is defined under § 3(h)(1) of the Act to mean:

an area of land from which minerals are extracted... and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits....

30 U.S.C. § 802(h)(1).

In *Jim Walters Resources*, (“JWR”), 22 FMSHRC 21 (Jan. 2000) the Commission addressed a situation similar to the instant one. There MSHA asserted jurisdiction over a general machine shop and a central supply shop located off of the mine premises. Following a hearing on the matter, a Commission judge found that the machine shop, which repaired and serviced electrical and mechanical equipment used in the JWR mines, was an integral part of the mining facility and properly fell under MSHA's jurisdiction. However, the judge found that the central supply shop, which housed safety glasses, hard hats, nails, conveyor belts, etc., was not a mine. In making his finding, the judge noted that MSHA's enforcement history was “inconsistent” because the agency had not previously sought to assert jurisdiction. Next, citing *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5 (Jan. 1982), the judge reasoned that some activities might be covered if on mine property, but would not be covered if outside mine property. The judge also noted that individuals performing supply activities were not exposed to hazards normally associated with mining.

In reversing the judge's decision regarding the central supply shop, the Commission held that the supply shop was a mine as defined by the Act. The Commission confirmed that the definition of "mine" is broad and must be given a sweeping interpretation, stating that a mine "is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals." 22 FMSHRC at 25 (citing *Harless Inc.*, 16 FMSHRC 683, 687 (Apr. 1994)). The Commission concluded that the central supply shop was a "mine" because it was a dedicated off-site facility of a multiple mine operator where employees received, stocked, maintained, and delivered equipment, tools, and supplies used at JWR's coal extraction sites and preparation plants. In ruling that the judge erred in finding that the function provided by the supply shop was one normally done by a vendor not exposed to the hazards of mining, the Commission noted that the supply shop employees should not be differentiated because the mine operator has centralized the supply room operations of four of its mines at a single off-site warehouse. In reaching this conclusion, the Commission stated that "the hazards to which miners are exposed are not limited to the hazards of . . . mines, but include improperly maintained equipment and supplies that are used in mining." *Id.* at 27.

The difference between the facility at issue and the Jim Walters repair and supply shops is that Maxxim, on a limited basis, provides services to mines other than Alpha mines. Moreover, Maxxim fabricates parts for heavy equipment that, in some instances, are sent to other Maxxim shops and subsequently sold to outside mines or other owners of heavy equipment. Maxxim estimates that up to 25% of its fabricated parts are moved to other shops and a portion sold outside of Alpha mines. Given that fabrication takes up about half of the shop, it is reasonable to estimate that about 12% of the total work done at the Maxxim shop discussed here, may be attributed to non-Alpha mines and/or non-mining related entities. Still, given the facts here, the activities conducted at the Maxxim shop are an integral part of the mining process. While there are some differences, they are not significant enough to distinguish this facility from that which was addressed in *Jim Walters, supra*.

Maxxim also argues that the Secretary abused his discretion by inconsistently exercising jurisdiction over this facility and similarly situated facilities. Maxxim points to the fact that MSHA removed the facility from its inspection list when it was located in West Virginia, and has now placed it back on the inspection list since it was moved to the Kentucky site. In response, the Secretary argues that Maxxim is a mine under the plain meaning of section 3(h)(1) of the Mine Act.

The Commission addressed these issues in *Jim Walters* and found that the statute is clear. There the Commission, in finding that the central supply shop qualified as a mine, stated that the language of the statute was clear and included facilities such as the supply shop. Just as the supply shop in *Jim Walters* was found to be "a dedicated off-site facility of a (multiple) mine operator where employees receive, stock, maintain, and deliver equipment, tools, and supplies used at JWR's coal extraction sites, preparation plants, and Central Supply Shop," *Id.* at 25, the Maxxim facility is a dedicated off-site facility of a mine operator where employees maintain, repair and fabricate equipment, used almost exclusively at Alpha's coal extraction sites and preparation plants. I find that there is Mine Act jurisdiction in this instance because a "mine"

includes “facilities” and “equipment . . . used in or to be used in” Alpha’s mining operations or coal preparation facilities.

Finding that Maxxim is a mine as defined by the Act is consistent with other Commission case law. In *Harless Inc.*, the Commission upheld MSHA jurisdiction over a sand dredging operation, and stated that “[t]he definition [of ‘coal or other mine’] is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals.” 16 FMSHRC 683, 687 (Apr. 1994) (citation omitted). The Commission noted the legislative history of the Act and the Congressional intent “to regulate all mining activity.” *Id.* Specifically, the Commission cited a Senate Committee report that “what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of inclusion of a facility within the coverage of the Act.” *Id.* (citing S. Rep. No. 181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978)). Similarly, in *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994), the Commission held that MSHA properly cited equipment in a storage garage that was shared by a sand and gravel operation and an asphalt plant. The Commission rejected the argument that title to the cited equipment was determinative and found it significant that the cited equipment was “used or to be used in mining and that . . . the cited conditions could affect miners in the garage.” *Id.*

In light of the above analysis, I find that Mine Act is clear and that the Maxxim facility is subject to MSHA jurisdiction.

*b. Citation No. 8260162*

On January 1, 2013, Inspector Randal Thornsburry issued Citation No. 8260162 to Maxxim for a violation of section 47.31(a) of the Secretary’s regulations. The cited standard requires each operator to “[d]evelop and implement a written HazCom program[.]” 30 C.F.R. § 47.31(a). The citation alleged that “[t]he operator does not have a HazCom program at the mine shop.” Thornsburry determined that an injury was unlikely to occur, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$100.00 has been proposed for this violation.

Randall Thornsburry has been an MSHA inspector for 14 years. Prior to becoming an inspector, Thornsburry worked 20 years as a foreman and superintendent at various coal mines. (Tr. 50). While most of his inspections are of underground mines, he has operated, and is familiar with, all types of mobile equipment.

Thornsburry inspected the Maxxim facility and reviewed the available records. At hearing, he explained that, among other things, a HazCom program should include the training for HazCom, types of chemicals used or stored at the location, and the material safety data sheet (“MSDS”) book, which contains information about each chemical or hazardous product. (Tr. 55). Thornsburry examined the filing cabinets and bulletin boards at the facility, and was unable to locate the required HazCom program.

Canterbury, who was assisting the inspector, searched the shop and office and was unable to locate a HazCom program. He was able to find some of MSDS, but he could not find the book containing all of the MSDS. Canterbury testified that some of the MSDS were onsite and that the workers are familiar with the chemicals and know how to safely use them. In order to abate the violation, Canterbury eventually called another location to send him a copy of a HazCom program that could be used at this location.

The mine is required to have on file, a written program that includes, among other things, a description of the manner and method of training, a list of chemicals and their location so that miners and inspectors who come on site know where chemicals are kept and the hazards associated with those chemicals. 30 C.F.R. § 47.32. Here, while some MSDS were on site, there was no program. Accordingly, I find that the Secretary has shown a violation of the cited standard. Moreover, while the facility did have some MSDS, no other apparent efforts were being made to remedy the violative condition. Accordingly, I find that the negligence was properly assessed as “moderate,” and that the proposed penalty of \$100.00 is appropriate.

*c. Citation No. 8260163*

Inspector Thornsburry issued Citation No. 8260163 to Maxxim for an alleged violation of section 71.402(a) of the Secretary’s regulations. The cited standard requires the following:

All bathing facilities, change rooms, and sanitary flush toilet facilities shall be provided with adequate light, heat, and ventilation so as to maintain a comfortable air temperature and to minimize the accumulation of moisture and odors, and the facilities shall be maintained in a clean and sanitary condition.

30 C.F.R. § 71.402(a). The citation described the violative condition as follows:

The operator is not maintaining the change room, wash sinks, and flush toilets in a clean and sanitary condition. The change room has a layer of dirt present on the entire floor which ranges up to ¼ inch in depth. The hand wash sinks and flush toilets have a coating of soap/dirt film on them, black in color, which completely covers the units.

Thornsburry determined that an injury was unlikely to occur, that one employee was affected and that the negligence was moderate. A civil penalty in the amount of \$100.00 has been proposed for this violation.

Thornsburry inspected the facility’s washroom and change room, which are used by everyone at the mine, numerous times each day, and found what he described as “terrible conditions.” There was a film of black soapy solution throughout the room. The change room floor was covered with up to a quarter of an inch of dirt and material, and the general sanitation was as bad as anything he had ever seen. He described the change room and shower room condition as “very bad.” (Tr. 66). While Thornsburry found that one of the bathrooms was in

good condition, the second was very bad and had a significant amount of dirt on floor. Thornsbery testified that, given the state of the area and amount of dirt, the condition had existed for at least several days. Moreover, he believed that the area had not been cleaned in a long time, perhaps 2-3 weeks. While Thornsbery believed that the condition created a health hazard, he nonetheless marked the citations as non-S&S.

Maxxim countered that the washroom, shower room and bathrooms are cleaned weekly by the staff. According to Maxxim, every Friday, the miners clean the shop, office, and change room. The mine asserted that the cited area had been cleaned the Friday prior to the inspection. Canterbury testified that he observed the dirty sinks and toilets. He justified the conditions by stating that the areas are used by men who are doing greasy mechanical work and, therefore, the dirt was not excessive. Canterbury attributed the condition of the second bathroom to a miner who left area just as Thornsbery arrived.

Thornsbery was confident that the conditions he cited were some of the worst he had observed and had existed for a significant period of time. I credit his testimony and find that the mine violated the standard as cited. I further find that the negligence was moderate and assess the \$100.00 penalty as suggested by the Secretary.

*d. Citation No. 8260164*

Inspector Thornsbery issued Citation No. 8260164 to Maxxim for an alleged violation of section 77.1104 of the Secretary's regulations. The cited standard requires, "Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard." 30 C.F.R. § 77.1104. The citation describes the violative condition as:

The rubber tired Caterpillar 988 Loader Co. No. 9628 has a coating of oil, diesel fuel, and dust at the back of the engine and in the center section area under the operators cab where the torque convertor, transmission, starter, and a tree of power leads are located. The power leads conduct 12 to 48 volts of DC power and are coated with the cited accumulations. This condition creates a fire hazard.

Thornsbery determined that an injury was reasonably likely to occur, that the injury could reasonably be expected or result in lost workdays or restricted duty, that the violation was significant and substantial, that one employee was affected and the negligence was moderate. A civil penalty in the amount of \$224.00 has been proposed for this violation.

On January 17, Thornsbery returned to the facility to complete his inspection. He looked at the shop area, including the equipment and machines that were in use. He did not inspect the equipment that was being worked on, as it was out of service. However, he did inspect the loader that the mine uses as a fork lift to unload heavy equipment.

While inspecting the loader he observed accumulations of combustible materials at the back of the engine and in an area under the operator's cab. Thornsbery explained that the cab of the loader sits directly above the transmission, and contains wiring that runs to the cab. In both areas, the accumulations consisted of oil, grease and dust. Given the condition he observed, Thornsbery calculated that the accumulations of dust and oil had been there for several weeks.

Thornsbery could see the conditions by walking around the loader and looking through an opening in the center section of the loader. No guards or covers were required to be removed to see the condition.

Thornsbery designated the citation as significant and substantial because it was reasonably likely that the accumulations, coupled with the electrical wiring would result in a fire on the equipment. If a fire were to occur, the equipment operator would suffer from exposure to smoke or a burn hazard. The equipment operator would have to climb down a ladder to escape from the cab and, in doing so, would be directly exposed to the fire. Given the amount of accumulations and the accumulations proximity to the 24 volt starter and lead, along with the fact that electrical equipment creates heat, Thornsbery opined that a fire was reasonably likely to occur and that it would result in a serious injury. Thornsbery has had experience with equipment fires. He explained that while working and operating a dozer, a hose burst and erupted into a fire. Although there were no broken hoses on this equipment, a fire can occur given the circumstances that he observed.

Canterbury explained that this front end loader is used to move equipment in and out of shop, and any dirt on the loader originated both the yard and shop. The mine, after the first day of the inspection, power washed the front end loader in preparation for the second day of the inspection and Canterbury believed that the equipment looked clean. Canterbury testified that, given their location under the cab and near the end of engine compartment, the accumulations were not easily seen. Canterbury, while not sure, thought that he had to remove a cover to see the accumulations on the motor. Moreover, he believes the power leads are not a fire hazard as they are enclosed in a jacket and he is not aware of any loader catching fire. I credit the testimony of Inspector in this regard, as he appears more knowledgeable and has had greater experience operating equipment.

“[I]n considering whether violations of section 77.1104 have occurred the Secretary must demonstrate: (1) the presence of combustible material; (2) that the combustible material was ‘allowed’ to accumulate; and (3) that the accumulations are located in an area ‘where they can create a fire hazard.’” *Northwestern Resources*, 21 FMSHRC 431, 438 (Apr. 1999) (ALJ). Here, the inspector has credibly testified that oil and diesel fuel, both of which are combustible had accumulated on the equipment. He indicated that, while the dust, most likely from the ground, may not have been combustible, the oil and fuel certainly are.

In *Northwestern Resources* the ALJ upheld a violation of this standard when an inspector issued a citation after observing hydraulic oil, lube oil, and some fine coal dust on the surfaces of the hose and frame of the engine compartment of a Hitachi backhoe. Similarly, in *Little Sandy Coal Co.*, an inspector observed several leaks in the hydraulic system of a Hitachi shovel used to load overburden into haulage trucks, and also observed pools of oil under and around the

operator's cab and oil on the equipment's frame. The judge found that there was a reasonable likelihood of an ignition of the accumulations of oil and grease. 17 FMSHRC 1638 (Sept. 1995) (ALJ).

Here, the accumulations were located in such proximity to the engine and the electrical wiring that it did create a fire hazard. Accordingly, I find that a violation of the cited standard existed as alleged.

#### Significant and Substantial Violation

A significant and substantial violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria). The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.* 32 FMSHRC 1257, 1281 (Oct. 2010)).

I find this violation to be significant and substantial. I base my finding on the testimony of Inspector Thornsby. Thornsby explained that the accumulation of oil and fuel in the two distinct locations created a measure of danger. Specifically, given the heat of the engine, and the wires and equipment near the accumulations, the danger of a fire existed. Thornsby has experience with fires on equipment and, given what he observed, he believed that it was likely that a fire would occur. If a fire were to occur under the cab, the operator would have to climb down through the smoke and fire area to escape, thereby making a serious injury reasonably likely.

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998). Thornsby is an experienced inspector and has very

specific experience with fires on mobile equipment. I credit his testimony and find that the violation was significant and substantial. I assess the \$224.00 penalty proposed by the Secretary.

## II. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, “in assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria:

[1] the operator’s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator’s ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is “bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a small machine and fabrication shop and, because it had only recently started at this location, has little history of assessed violations. The operator has stipulated that the penalties as proposed will not affect its ability to continue in business. The gravity and negligence of each violation is discussed above and the operator demonstrated good faith in abatement. As noted above, I assess a total penalty of \$424.00.

### III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed above for a total penalty of \$424.00. Maxxim Rebuild Company, LLC is hereby **ORDERED** to pay the Secretary of Labor the sum of \$424.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller  
Margaret A. Miller  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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October 25, 2013

PRAIRIE STATE GENERATING CO.,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. LAKE 2009-711-R
	:	Citation No. 6680548; 09/17/2009
v.	:	
	:	Docket No. LAKE 2009-712-R
SECRETARY OF LABOR,	:	Citation No. 6680549; 09/17/2009
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Mine: Lively Grove Mine
Respondent,	:	Mine ID: 11-03193
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2010-171
Petitioner,	:	A.C. No. 11-03193-201615
	:	
v.	:	
	:	
PRAIRIE STATE GENERATING CO.,	:	
Respondent.	:	Mine: Lively Grove Mine

**DECISION ON REMAND**

Before: Judge Miller

This matter is before me on remand from the Commission, *Prairie State Generating Co.*, 35 FMSHRC \_\_\_, slip op., Nos. LAKE 2009-712-R and LAKE 2009-711-R (July 16, 2013), and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Prairie State Generating Company (“PSGC”), at its Lively Grove Mine pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § § 815 and 820 (the “Mine Act”).<sup>1</sup> For the reason’s set forth below, I **AFFIRM** the citations as issued and assess a \$200.00 penalty.

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<sup>1</sup> A hearing on Docket Nos. LAKE 2009-711-R and LAKE 2009-712-R was held on February 9<sup>th</sup> and 10<sup>th</sup>, 2010. At the time of the hearing, the Secretary had not yet proposed a penalty for the two subject citations. Accordingly, the above captioned penalty proceeding, LAKE 2010-171 was not addressed in the court’s May 21, 2010 decision on the merits, nor in the Commission’s July 16, 2013 decision remanding certain issues for additional analysis. The remanded issues and penalty portion are addressed in this decision.

## I. BACKGROUND

On August 28, 2009, PSGC re-submitted a ventilation and roof control plan originally dated July 31, 2009, to MSHA. The parties entered into negotiations and discussed various plan provisions. In September 2009, PSGC communicated its intent to implement the unapproved plans in order to bring the subject contests. By agreement between MSHA and the Contestant, the mine began operation without an approved ventilation plan or approved roof control plan in place. Subsequently, on September 17, 2009, MSHA issued two technical citations alleging that PSGC was operating its mine with an unapproved ventilation plan in violation of 30 C.F.R. § 75.370(d) and an unapproved roof control plan in violation of 30 C.F.R. § 75.220(a)(1). Contestant requested a hearing to challenge two citations.<sup>2</sup>

The first contested citation, Citation No. 6680548, alleges a violation of 30 C.F.R. § 75.370(d), which states that “[n]o proposed ventilation plan shall be implemented before it is approved by the district manager.” In deciding whether to approve a proposed ventilation plan, MSHA looks to § 75.370(a), which provides in pertinent part that “[t]he operator shall develop and follow a ventilation plan approved by the district manager [and] [t]he plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.” 30 C.F.R. § 75.370(a).

The second contested citation, Citation No. 6680549, alleges a violation of 30 C.F.R. § 75.220(c), which states that “[n]o proposed roof control plan or revision to a roof control plan shall be implemented before it is approved.” Section 75.220(a)(1) explains that the “[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine.”

On May 21, 2010 this court issued a decision affirming the citations on the grounds that the Secretary, by way of the Mine Safety and Health Administration (“MSHA”) district manager whose district includes the location of the Lively Grove mine, did not abuse his discretion in rejecting the mine’s proposed ventilation and roof control plans. In reviewing the district manager’s rejection of PSGC’s proposed plan provisions, the court applied the “arbitrary and capricious” standard.

On review, the Commission upheld the court’s decision to apply the “arbitrary and capricious” standard of review to the district manager’s decision rejecting the mine’s proposed plan provisions. The Commission stated that “absent bad faith or arbitrary action, the [district manager] retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan’s approval.” *Prairie State Generating Co.*, 35 FMSHRC \_\_\_, slip op. at 5, Nos. LAKE 2009-712-R and LAKE 2009-711-R (July 16, 2013)(quoting *C.W. Mining Co.*, 18 FMSHRC 1740, 1746 (Oct. 1996)). Moreover, the Commission found that substantial evidence supported the court’s findings that the district manager did not abuse his discretion in denying approval of the mine’s proposed plan provisions calling for extended cuts, wider entries and

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<sup>2</sup> A fuller background can be found in this court’s May 21, 2010 decision on the merits, 32 FMSHRC 602 (May 2010) (ALJ).

longer diagonals. However, the Commission remanded the contest cases back to the court to apply the arbitrary and capricious analysis, consistent with Commission Rule 69(a),<sup>3</sup> to six additional proposed ventilation or roof control plan provisions: air quantities in the last open crosscut; red zone issues in the roof control plan; numbers of turns in the crosscuts; curtain setback; using mesh in-cycle in the roof control plan; and, the roofbolter in relation to the continuous miner. *Prairie State Generating Co.*, 35 FMSHRC \_\_\_\_, slip op. at 10, Nos. LAKE 2009-712-R and LAKE 2009-711-R (July 16, 2013).

On September 20, 2013 the parties submitted additional stipulations indicating that the only issue that remained in contest was “[t]he amount of air required in the last open crosscut: whether it should be 9,000 cfm and 12,000 cfm, depending on the number of open crosscuts or 20,000 cfm and 25,000 cfm.” Additional Stips. 2-3. Accordingly, this Decision on Remand addresses whether the District Manager abused his discretion in deciding this singular issue, and, if necessary, the appropriate penalties for the two citations.

## II. AIR QUANTITIES IN THE LAST OPEN CROSSCUT

During the plan negotiations the Contestant sought a reduced requirement in its ventilation plan for the quantity of air needed to assure compliance with respirable dust standards near the continuous miner and other working areas. Victor Daiber, engineering manager for the mine, testified that a reduced quantity of air is appropriate for the unique “fishtail” ventilation of this mine. Daiber stated that the fishtail configuration improves the dust condition and methane control in a mine, (Tr. 300), and that between 9,000 and 12,000 cfm (cubic feet per minute) of air would be adequate for the particular ventilation system at this mine. (Tr. 301). He explained that a lower volume of air is adequate because the air current is effectively split, and only sweeps through half of the equipment, as opposed to all of the air sweeping across all of the equipment. (Tr. 333-34). According to Daiber, the mine’s design increases the efficiency of the ventilation system, as there are two distinct last open crosscuts, each with their own mining equipment and air current, and not one last open crosscut and a walk-between. (Tr. 300, 342-43). Daiber testified that he researched every mine’s dust records listed on the pertinent MSHA website from the beginning of 2007 on, and modeled the instant ventilation plan after another mine which had one of the best dust records in the district. (Tr. 301-02).

However, the Secretary does not agree, and maintains that a significantly higher air quantity is needed to ensure adequate ventilation under the respirable dust standards. The inspector testified that in a mine such as this one – with three open crosscuts and a line curtain in the fourth crosscut – it is necessary to require a higher quantity of air. (Tr. 87-88). This is because in a typical setup with this configuration, equipment must frequently travel through the curtains, which can result in a short-circuiting of the air if the curtains are not designed, installed,

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<sup>3</sup> Rule 69(a) requires that a Commission judge’s decision “include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record.” 29 C.F.R. § 2700.69(a).

or maintained properly. *Id.* This, in turn, can reduce the quantity of air at the last open crosscut, which does not meet the ventilation needs of that section.

The inspector also testified that although there are other ventilation plans in the district which allow for lower air quantities, greater quantities are actually used in order to comply with respirable dust standards. (Tr. 84-85, 124). He clarified that the lower allowable quantities found in other plans are only for operators to avoid citations for face ventilation, and that typically, other mines in the district with lower allowable quantities actually operate between 18,000 and 25,000 cfm. (Tr. 85).

MSHA proposes that between 20,000 and 25,000 cfm is necessary in this mine. (Tr. 86-87, 136-37, 238). The amount of air in the working section must be sufficient both for dust control and to dilute any methane that is liberated. (Tr. 84). The inspector testified that the mine was proposing to use a scrubber which had a rating that required 6,400 cfm of air for its use, and to have 7,000 cfm at the end of the blowing line curtain. (Tr. 85-86). He stated that, generally speaking, the starting point for evaluating the amount of air required at these locations is to provide three times those proposed quantities of air, so 19,200 cfm and 21,000 cfm respectively, so he determined that 20,000 cfm was an appropriate amount to require at the outset. (Tr. 86). 20,000 cfm would then provide adequate ventilation at the scrubber and at the end of the blowing line curtain. *Id.* The inspector described this value as an “initial evaluation” of the mine’s ventilation plan, *Id.*, so presumably the value may be adjusted at a later date if the mine can show that a lower quantity of air is needed to maintain acceptable dust exposure levels.

I find that the District Manager did not abuse his discretion in requiring the mine to have higher air quantities than those sought by PSGC’s proposed plan provisions. There is nothing to suggest that his decision-making was arbitrary and capricious, nor made in bad faith, nor due to an error in judgment. I find that in discussing the particular conditions at this mine, as well as other plans and practices within the district, the District Manager has considered “the relevant data and [has] articulate[d] a satisfactory explanation for” his decision, *see Twentymile Coal*, 30 FMSHRC 736, 754-55 (Aug. 2008), and has established a “rational connection between the facts found and the choice made.” *Id.* (quoting *Motor Vehicle Mfr’s Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). As such, I find that the District Manager did not abuse his discretion in requiring plan provisions that required a higher air quantity in the last open crosscut.

In light of the above findings, and my earlier findings, I **AFFIRM** Citation Nos. 6680548 and 6680549.

### III. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary

that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, “in assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria:

[1] the operator’s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator’s ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is “bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The parties have stipulated to many of the penalty criteria. The history of assessed violations shows a reasonable history for this mine. The parties agree that the mine is a large operator, the penalties as proposed will not affect its ability to continue in business, and it demonstrated good faith in abating the violations. Additional Stips. 2. Given the technical nature of the citations, the gravity and negligence were properly assessed as low. The Secretary has proposed a \$100.00 penalty for each of the subject citations. In light of my findings, I assess the penalties proposed by the Secretary for a total penalty of \$200.00.

#### IV. ORDER

Accordingly, I conclude that the Secretary has met his burden of proving that the District Manager did not abuse his discretion with regard to above discussed plan provision. Accordingly, Citation Nos. 6680548 and 6680549 are **AFFIRMED**, and Prairie State Generating Company is hereby **ORDERED** to pay the Secretary of Labor the sum of \$200.00 within 30 days of the date of this decision. Upon receipt of payment, the contest cases are **DISMISSED**.

/s/ Margaret A. Miller  
Margaret A. Miller  
Administrative Law Judge

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October 25, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2011-257-M
Petitioner	:	A.C. No.: 37-00191-259515
	:	
v.	:	
	:	
J. SANTORO, INC.,	:	
Respondent	:	Mine: Wood River Pit

DECISION

Appearances: Gail E. Glick, Esq., U.S. Department of Labor, Office of the Solicitor, Boston, Massachusetts, for the Petitioner,

Ronald Gendron, Pro Se, Smithfield, Rhode Island, for the Respondent.

Before: Judge Koutras

STATEMENT OF THE CASE

This civil penalty proceeding pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 802, et Seq. (20000), hereinafter the "Mine Act", concerns nineteen (19) Section 104(a) non-significant and substantial ( S & S) citations, and one "S & S" citation served on the respondent on April 14, 15, and 19, 2011, for alleged violations of mandatory safety and health standards found in Parts 46, 47, and 56, Title 30, Code of Federal Regulations. The civil penalty assessments proposed by the Secretary total \$2,036, for all of the alleged violations.

A hearing was held in Providence, Rhode Island on May 29, 2013, and the parties appeared and participated fully therein. The parties were afforded an opportunity to file briefs. The Secretary filed a brief. However, although given an opportunity to file a brief (Tr. 5), the respondent opted not to do so (Tr. 229). I have considered all of the arguments of record in the course of this decision, including the respondent's arguments made in the course of the hearing (Tr. 201-224).

## Stipulations

The respondent confirmed the receipt of all of the Secretary's hearing exhibits consisting of the citations, photographs, and field notes of the inspector who conducted the inspections that resulted in the issuance of the alleged violations, and except for "some photographs that are omitted" he agreed to the introduction of all these exhibits for the record (Tr. 6). Further, the respondent was afforded the opportunity to cross-examine the inspector in the course of the hearing, including pointing out any problems with any photographs.

## DISCUSSION

MSHA Inspector Andrew Bower testified that he has served as an inspector for five years and two months inspecting metal, non-metal or non-coal surface and underground mines, typically rock quarries, and open pit mines. He confirmed that he inspected the respondent's Wood River Pit on April 14, 2011, met and interviewed Ron Gendron, Sr., confirmed jurisdiction and that the screen plant had been operated in February, 2011, and completed a legal mine ID (Tr. 9-11).

Inspector Bower described the Wood River Pit "Plant" operation as a sand and gravel mine with a gravel bank, a fixed plant and mobile equipment that produced three-quarter inch or three-quarter/three-eighths mix, sand, and three-inch stone that is extracted for sale. He identified photograph Exhibit P-1, as the screening plant and confirmed that he took all of the relevant photographs in this case (Tr. 12).

Inspector Bower explained his reasons for issuing Citation No. 8647621, for the failure of the respondent to notify MSHA prior to commencing its plant operation as required by Section 56.1000 (Ex. P-1). He testified that he issued the citation because the plant had operated in February, 2011, and MSHA was not notified that operations had commenced. He stated that the notification requirement was an important requirement because it has been cited as a contributory factor to fatal accidents. He confirmed that he "reactivated" the mine ID number and treated the citation as an "administrative violation" (Tr. 30-31).

Inspector Bower testified that his conclusion that the plant had been operated in February, 2011, was based on the photographs depicting a roadway with visible wheel-loaded tire tracks up the feed approach roadway to the feed hopper for the screening plant as well as belt roller corrosion had been worn off because of the belt running over the rollers (photograph Ex. P-2, P-3, P-4); as well as the statement by Ron Gendron, Jr., that the plant had operated in February, 2011. (Tr. 17-20).

Inspector Bower stated that his field notes of April 14, 2011, reflect statements by Ron Gendron, Jr., that he operated the screening plant to produce 50 yards of material sold to the town of Smithfield, Rhode Island, in February, 2011, and had "given a few loads to a guy across the street" (Ex. P-3). He confirmed that he had no reason not to believe the respondent's assertion that

the plant had not operated from February to April, 2011 (Tr. 21). He reiterated that his field notes state that the respondent sold 50 yards of screened sand to the town of Smithfield, Rhode Island, and operated for six hours that day (Tr. 36). He could not confirm that with the exception of that sale, no sales were made from 2008 through August, 2011 (Tr. 34).

Inspector Bower stated that when he initially arrived at the plant on April 14, he asked about the status of the operation, including past and present operations, its availability for use, and whether it was locked out. He stated that the plant is operated “off street power”, that a lock was installed on the disconnect but it was not locked out for the purpose of shutting it down for the season for maintenance (Tr. 15). He stated that when he met with Ron Gendron, Jr., the next day on April 15, he reviewed every violation and Mr. Gendron did not dispute or challenge his findings and agreed to take corrective action and confirmed that he corrected all of the cited conditions (Tr. 23).

Inspector Bower stated that the plant was available for use and that “it had operated in February under the violative conditions and was in service and ready and available for use” (Tr. 15). He confirmed that the plant was locked out and not in operation or producing product on April 14, 15, and 19, 2011, when he conducted his inspections (Tr. 15-16). He further confirmed that the plant operated under a separate mine ID number until 2003, when it was placed in an abandoned status, until he reactivated the ID number on April 14, 2011 (Tr. 27-29).

In the course of cross-examining the inspector, respondent took issue with the inspector’s contention that the plant operated for six-hours in February, 2011, and pointed out that the inspector confirmed the loader did not operate when he was there. He disputed the inspector’s notes that reflected another loader was used that day (Tr. 38).

The respondent asserted that he and his son were at the plant on one day in February for six hours, and he agreed with his son’s statement that the plant was running for one hour trying to free the hopper from snow and ice from the feeder and that no sand or gravel material was processed through the plant because the ice at the base of the feeder and hopper could not be removed (Tr. 40).

Mr. Gendron, Sr., stated that it took three hours “to get the loader running”, and that at 2:00 or 3:00 p.m. that day “went to the gravel in the back and took two loads of gravel back” and that “the plant did turn the conveyors but produced no material”. He did not deny that “something was done that day” (Tr. 41-42). He further confirmed that he and his son admitted that something was done and were not attempting to hide anything (Tr. 43).

Mr. Gendron stated that the plant has been idle since 2011, and has not operated subsequent to the issuance of the citations in this case. In response to the Court’s inquiry, Inspector Bower stated that he had no knowledge whether or not the plant has been abandoned or shut down and that after his follow-up inspection in April, 2011, he had no further contact with that operation. He confirmed that none of the violations in this case involved any accidents or

injuries (Tr. 44). The record reflects that the respondent was afforded an opportunity to present evidence and inquire about each of the remaining citations (Tr. 63).

Citations 8647622 and 8647628 concern alleged violations of Section 56.9300(b), requiring berms to be maintained at least mid-axle height of the largest self-propelled mobile equipment usually traveling the roadway (Ex. P-4, P-5 citations and photographs). Inspector Bower testified that he measured the heights of the existing berms and found that they were deficient in height with respect to the height of the Michigan 17A-A wheel loader. The height of the berms were described as ranging as high as 24 inches, at the locations described on the face of the citations, and he measured the mid-axle height of the loader as 32 inches.

Inspector Bower concluded that the height of the berms exposed the loader operator to an overtravel/overturn hazard, and he described the conditions that he observed and recorded in his notes for both violations, including, his non - S & S, unlikely gravity, and moderate negligence findings (Tr. 58 - 66). The respondent opted not to question the inspector with respect to the berm violations (Tr. 66).

Citations 8647626 and 8647627 concern alleged violations of Section 56.14112(b), requiring guards to be securely in place while machinery is being operated (Ex. P-6, P-7). With respect to Citation 8647626, inspector Bower testified that the guard for the self cleaning conveyor tail pulley was missing and not maintained in its proper position. The citation states that it was removed for cleanup purposes and placed on a nearby concrete block.

Inspector Bower testified that the respondent informed him that the conveyor ran without the guard in place because of the accumulated snow (Tr. 71). Mr. Bower stated that the missing guard posed an accidental contact hazard with the rotating tail pulley fin and belt that was readily accessible (Tr. 72 - 73). He determined the violation was non - S & S, the gravity as unlikely, and moderate negligence.

With respect to Citation 8647627, Mr. Bower stated that he found unguarded gaps of 18 x 24 inches on the left side of the cited conveyor, and gaps of 6 x 20 inches on the right side. He stated that the guards had been removed and posed a hazard of an accidental contact with the rotating tail pulley that was elevated eight inches above ground level.

Inspector Bower identified the individual in the photograph (Ex. P-7) as Mr. Gendron, Sr., and speculated that he was cleaning out the snow. He stated that his notes reflect that Mr. Gendron told him the guard was removed in February, 2011, to remove snow and that the plant ran with the guard off. He further stated that Mr. Gendron informed him that he planned to reinstall the guard after clearing out the snow and that he did so (Tr. 76 - 77).

Citation 8647633 concerns an alleged violation of Section 56.14107(a), requiring the guarding of machine parts to protect persons from contacting moving machine parts that can cause injury (Ex. P-8). Inspector Bower testified that he found an unguarded V-belt drive assembly on a garage shop air compressor with an exposed belt and pulley system and motor and drive shafts.

The hazard concerned a pinch point between the compressor belt and drive sheave as shown by an arrow on the associated photograph (Ex. P-8). While there was limited use of the adjacent travelway, it was unlikely that anyone would be in the area, but the rear of the compressor at the pinch point would be accessible from the front of the compressor, and if someone were to stumble or fall they could reach out and contact the belt (Tr. 78 - 81).

Inspector Bower determined that the violation was non - S & S, that any injury was unlikely, and resulted from moderate negligence. Although he indicated that any injury would be permanently disabling, this was only possible if anyone contacted the unguarded pinch-point (Tr. 82 - 83). The respondent opted not to question the inspector concerning Citations 8647626 and 8647627 (Tr. 77). However, he questioned the inspector, and explained the air hoses related to the cited compressor pinch point associated with Citation 8647633, but did not further question the inspector (Tr. 79).

Citation 8647636, concerns an alleged violation of Section 56.12004, requiring electrical conductors to be of a sufficient size and current carrying capacity to insure that a rise in temperature resulting from normal operations will not damage the insulating materials, and the protection of conductors from exposure to mechanical damage, (Ex. P-11).

Inspector Bower testified that two bushings that were installed to hold the 480 volt power cable for the junction box on the frame of the sand stacker were broken and the conduit was pulled away exposing the inner power feed wires between the box and the conduct on the top and left side. He also found that the upper bushing hole was not sealed to prevent water and dust entering the box, and water was coming out of the box (Tr. 97-99).

Inspector Bower stated that the last sentence of Section 56.12004, requires that electrical conductors exposed mechanical damage be protected. He confirmed that he relied on that sentence in issuing the citation because the damaged bushings did not afford protection for the inner insulated power feed wires because the broken bushings were apparently subjected to some mechanical damage (Tr. 97-100). He believed the damaged bushings presented a potential electrocution hazard (Tr. 101). He determined that the violation was non - S & S, with unlikely injuries and resulted from moderate negligence (Ex. P-11).

The respondent questioned the need for a conduit on the conveyor and stated that the wire is heavy duty and that he installed the conduit because “he was a safety nut” and the conveyor is insulated (Tr. 100). He had no further questions for the inspector (Tr. 101).

Citation No. 8647642 concerns an alleged violation of Section 56.12028, requiring an operator to conduct annual electrical continuity and resistance testing of its grounding systems and to make available a record of the most recent testing on a request by the Secretary’s authorized representative (Ex. P-12).

Inspector Bower stated that he issued this citation because the respondent could not produce a record of a recent grounding system continuity test and that his notes reflected that he was informed that no test had been made for three or four years. His notes further reflect a notation that the respondent did not address this issue because “the plant is used on an intermittent basis, ran one day in February, very little usage except this year if at all”, and that the ground rods were in place (Tr. 104).

Inspector Bower stated that the plant, as well as a nearby service garage, operated from “street power” and that the operational equipment was powered by 480 volt and 110 volt electrical circuits. He stated that testing was required to insure that all electrical systems are operating properly in the event of a ground fault condition that may result in a potential fatal electrocution hazard (Tr. 103-106). He determined that the violation was non - S & S, with unlikely injuries, and resulted from moderate negligence (Ex. P-12).

The respondent questioned the inspector with respect to this citation (Tr. 107-110). The inspector confirmed that the pit location had at least three electrical services. The respondent asserted that it purchased its own testing equipment and that he and his son were trained by an MSHA inspector to use the equipment for testing at his Smithfield, Rhode Island, location, and records are kept there (Tr. 107-108). Inspector Bower confirmed that he could not recall that he was shown the testing equipment at that location (Tr. 108).

The respondent agreed that its wood river pit operations utilizing a 440 volt electrical service was susceptible to a ground fault and that he would perform testing and record the results if the plant was in operation. The respondent conceded that no tests were performed on the one day in February, 2011, when he was “trying to produce sand” for the city of Smithfield because the plant was not used that day. The respondent further conceded that the plant was available for use that day and he could not produce any record of testing for the inspector (Tr. 109-111).

Citations 8647637 and 8647638 concern alleged violations of Section 56.11001, requiring an operator to provide and maintain a safe means of access to all working places (Ex. P-13, P-14). With respect to Citation 8647637, Inspector Bower testified that a fixed vertical ladder providing access to the screen plant elevated walkway was directly over a sloped ground area consisting of unconsolidated gravel material that did not provide a level surface beneath the ladder. He was concerned that someone could slip or fall while attempting to access the ladder (Tr. 112-113).

Inspector Bower confirmed that he reviewed the citation with the respondent, but his notes do not reflect that they discussed the ladder accessibility issue and do not reflect that it was accessed in February, 2011 (Tr. 114). He explained that even if any personal exposure was once during the year the plant was in operation for one day, “that one time is too much without taking corrective action” (Tr. 114).

Inspector Bower agreed that the ladder was sufficient in terms of “stability”, but not sufficient to provide safe access (Tr. 116). However, he explained that in order to access the ladder, someone would be standing on sloped hazardous loose materials below the ladder that did

not provide a level base for access from the sloped ground (Tr. 120-121). Anyone accessing the ladder from the front or side could slip or slide while attempting to access the ladder or stepping off onto the slope that was on an approximate angle of thirty degrees (Tr. 123-124). He agreed that it was possible that the sloped area was the result of sand that may have accumulated after ten years of inactivity in an area that was not used during that time (Tr. 115).

In its defense to this citation, the respondent stated that he completely removed the ladder and replaced it without another one, welded a piece across that location and installed steps to the left of the conveyor for a safe access (Tr. 124).

With regard to Citation 8647638, Inspector Bower stated that he found that similar sloping ground conditions did not provide safe access to a ground-level electrical disconnect box adjacent to the screen plant in front of the steep drop-off consisting of unconsolidated gravel materials (Tr. 126). The disconnect switch would be used to energize or de-energize the screen plant. Although the sloping ground was not as severe as the ladder citation slope, it did constitute a slipping hazard (Tr. 127). He confirmed that fill was added to the slope and a chair railing was painted a conspicuous color (Tr. 129).

The respondent questioned the inspector about several plant locations that housed power disconnecting devices for locking out the entire property, including the garage and generator building. The respondent stated the cited disconnect device was totally disabled. The inspector could not recall that the respondent informed him that it was not functional. He stated it was not locked out and had no warning tag (Tr. 130-135).

The inspector determined that Citation 8647637 was significant and substantial (S & S) with a reasonably likely injury, and the result of moderate negligence (Tr. P-13). He determined that Citation 8647638 was non-S & S, with unlikely injury, and the result of moderate negligence.

Citation 8647641, 8647635, and 8647630 (Ex. P-15, P-16, P-17) concern alleged violations of Section 56.18002(a), requiring a competent person designated by an operator to examine each working place at least once a shift for conditions which may adversely affect safety (8647641); Section 46.3(b)(1) through (b)(5), requiring the development and implementation of a written MSHA approved training plan for surface sand, gravel, and stone mine operations; and Section 47.31(a) requiring the implementation and maintenance of a written HazCom written program.

With respect to Citation 8647641, Inspector Bower stated that he based his determination that the required pre-shift examinations were not made was based on the fact that he issued thirteen citations during his inspection on April 14, 2011, and concluded that the violative conditions could have been discovered with a complete and thorough workplace examination that he believed was ineffective and inadequate because of the number of cited violations, as well as the severity of the hazards. He conceded that such a determination is an inspector's "judgment call" and that he did not consider the last sentence of the cited Section 56.18002(a), stating "the operator shall promptly initiate appropriate action to correct such conditions" (Tr. 136-137).

Inspector Bower confirmed the operator's requirement to note the examinations when they are done and in reply to a question concerning the existence of a pre-shift book, he stated as follows at (Tr. 140):

THE WITNESS: There was in my notes. I think it was in a journal or something. I would have to look through my notes. But I think something may have been documented. I'd have to look through.

THE COURT: May have been. Did you look?

THE WITNESS: I always look for workplace exams. If I may look through my field notes?

Upon examination of his notes, Mr. Bower found no notation of any record of any workplace examination being made (Tr. 141). The Court notes that his inspection notes do not reflect that he asked for or reviewed any pre-shift examination books. His justifying notes that the operator (Ron Gendron, Jr.) conducts work place exams ("confirmed by doc 2010"), but that "his father (Ron Gendron, Sr.) does not follow 58.18002, . . . and mgmt did not spot check to insure they were being done properly. Got lax due to limited activity." (Ex P-15).

Inspector Bower conceded that none of the 13 citations alleging violations at the plant and garage were not further described or incorporated by reference (Tr. 141-142). He commented that "I do that diligently now. I didn't here." (Tr. 143). The respondent asked no questions and the Secretary's counsel asked no further questions (Tr. 147).

With respect to Citation 8647635, Inspector Bower stated that he issued the citation because the respondent had no training plan for the Wood River Pit, and he treated it as a record keeping violation of a low hazard level because Mr. Ron Gendron, Sr., did have current annual refresher training, and he was trained under the respondent's training plan for its Smithfield main plant mine ID number which had a training plan for that location and not the pit operation (Tr. 148). The inspector's notes states "the operator felt it was acceptable to MSHA to (sic) the plant/mine under the 37-00065 ID" (Ex P-16).

Inspector Bower testified that he issued Citation 8647630 because the respondent had no written HazCom plan, including the program contents pursuant to Section 47.32. He stated that hazardous chemical material and flammable and oxidizing compressed gases were present at the plant. His notes reflect that fuel, oil, grease, and compressed flammable and oxidizing gases were located in the garage (Tr. 150-152).

Inspector Bower stated that the respondent informed him that he was not aware of any hazard associated with the storage of an acetylene tank and if he had a HazCom program in effect he would have been aware of the fact that storing acetylene on the side causes acetylene to separate from the solvent and becomes highly unstable when used upright or on its side and could cause a fatal accident (Tr. 152-153).

The respondent questioned the inspector about the use of an acetylene tank and asserted that the acetylene cylinders were on the floor so they would not hurt anyone. He believed that since no one would go to the area, it would be safer to leave them on the floor than have them roll into someone. The respondent explained that any cylinder that is turned upright after laying on its side is not used for twelve hours. The inspector commented that two hours was sufficient to safely use the cylinder (Tr. 153-154).

In addition to the presence of acetylene tanks, the respondent confirmed that motor oil and greases were in the garage and agreed that they were chemicals and commented that “after 30 years, no one ever mentioned that you need a HazMat (sic) for a pail of grease and a pail of motor oil (Tr. 157).

Inspector Bower determined that citations 8647641 and 8647630 were non - S & S, with unlikely injuries, and that Citation 8647635 was non - S & S, with no likelihood of any injury and the result of low negligence (Ex. P-15, P-16, P-17).

Citations 8647631 and 8647632 concern an alleged violation of Section 56.4201(b), requiring the person inspecting the fire extinguishers to certify that an inspection had been made and the date on which it was made (8647631, Ex. P-18); and Section 56.13015(a), requiring compressed air receivers to be inspected by an inspector holding a National Board Commission pursuant to the inspection code followed by that organization (8647632, Ex. P-19).

Inspector Bower stated that he issued the fire extinguisher citation after finding three of them in the garage that had no attached service tag verifying that they had been inspected. Inspections are necessary to insure they are serviceable and have been maintained pursuant to the maintenance standard. The extinguisher pressure gauge reflected they were fully charged but their actual condition could not be determined without a service tag (Tr. 158-160).

Inspector Bower stated he issued the air tank receiver citation because it was an operable air tank that could be used for compressed air cleaning, inflating tires, spray painting “and a number of things”. Although it was not used frequently, it was operable and energized (Tr. 161-162). He confirmed that he found no record of any inspection that is important in order to insure the tank was in a safe functional condition and met the code requirements. In the event of a tank rupture, personnel in the garage shop could be affected (Tr. 163). The respondent did not question the inspector. However, he confirmed that the inspector’s inspection note stating “mine mgmt not aware of MSHA standard requirement” was true, and that he was not aware and had never conducted any such test. The inspector confirmed that the test was done and the citation was terminated (Tr. 164). He determined that the citations were non - S & S with unlikely injuries and the result of low negligence (Ex. P-18, P-19).

Citation 8647629 concerns an alleged violation of Section 56.16005 requiring compressed liquid gas cylinders to be secured in a safe manner (Ex. P-20). Inspector Bower stated that he found a gas cylinder and an acetylene gas cylinder lying on their side in the middle of the garage floor. He considered this an unsafe storage method that posed a fall hazard as well as an exposure

of physical damage to the cylinders as a result of not being secured. The garage is accessed by Ron Gendron, Sr., who secured the cylinders within an hour by securing them upright on a cart within an hour (Tr. 167-167). The inspector determined the violation was non - S & S, with unlikely injury, and the result of lower negligence (Ex. P-20).

Citation 8647639 concerns an alleged violation of Section 56.14100(b), requiring the timely correction of any equipment or machinery defects that affect safety in order to prevent the creation of a hazard to persons. Inspector Bower referred to three photographs that he took at the time of his inspection and described in detail the condition of the feed hopper, including the supporting steel structures and steel bracing materials (Ex. P-21).

Referring to the first photograph of the top of the feeder, Mr. Bower stated that the diagonal bracing for the four structural supports was either detached or severely damaged and bent out of shape, and there were corroded welds at the steel plates welded to the medical support columns. He believed these conditions may compromise the integrity of the structure and that any impact loading over time, given the damaged hopper bracing, presented the possibility the structure holding the chute would fall (Tr. 169-170). He identified the damaged angle iron bracing, one that was detached, and another that had broken off. Although there was some horizontal cross-bracing for the structure, he concluded that “the bracing for torsional strength is pretty much detached or severally damaged” (Tr. 171-172).

Inspector Bower confirmed that while the plant was a “one man operation”, if the structure would fall, crushing injuries would result and the horizontal bracing needed to be fixed. He confirmed that it was (Tr. 172). His notes reflect that “bracing was reconnected and weld repairs were performed on the feed hopper support structure”, and the defects were eliminated (Tr. 176).

The respondent questioned Inspector Bower and learned that he is a structural engineer with a degree in structures, mechanics, and materials (Tr. 172). Although the inspector initially believed the four hopper support beams embedded in concrete would support the hopper, he explained that he could not state with 100 percent certainty when the structure would fail or what would cause it to fail, and given the bracing conditions at the lower point of the hopper, he believed the integrity has been compromised because of the weight of the materials as it is dumped into the hopper (Tr. 172 - 173). He determined the violation was non - S & S with unlikely injury and moderate negligence (Ex. P-21). The respondent explained that the bottom braces were removed when the plant electricity was installed in order to get under the conveyor to shovel, and he did not believe the small 3 inch angle iron braces added anything to support the hopper (Tr. 176).

Citation 8647640 (Ex. P-22) aptly characterized by the Secretary’s counsel as “the toilet in the woods” (Tr. 179) concerns an alleged violation of Section 56.20008(a), that states as follows:

(a) Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel.

Inspector Bowers described the alleged violations as follows:

The mine operator failed to provide toilet facilities at the mine property. There were no company or public toilet facilities immediately available, leaving personnel with no sanitary toilet facilities to use if needed. This condition increases the risk of adverse health effects. One worker is employed at the mine property.

Inspector Bower confirmed that he issued the citation because there is no toilet facilities at the mine property. He stated that he always asks an operator “is there something really close around the corner? And there wasn’t anything available and simply doesn’t meet the standard requirement” (Tr. 180).

Inspector Bower explained the hazard associated with the lack of toilet facilities as “urinary retention in some circumstances and defecation delay with some people”. Although Mr. Gendron, Sr., was the only person at the pit, the inspector stated that “I wasn’t talking specifically Mr. Gendron”, and that it could happen to anyone whether its on the site or not (Tr. 180 - 181).

Inspector Bower confirmed that the respondent purchased a Porta-Potty and that it was acceptable, and considering the small operation, he may have checked its acceptability. He was not aware of any MSHA mine toilet policies. With respect to the meaning of the regulatory term “compatible”, he believed it may refer to the number of employees at the site and the need for more than one toilet, the use of chemicals that may be hazardous, hand cleaning facilities, and more specifically providing enough toilets in relation to the size of the mine (Tr. 183 - 184).

The respondent explained that his practice was to use “the McDonald’s around the corner and usually go there for breakfast and we go back to the pit”. He stated the distance from McDonald’s to the plant as “an eighth of a mile (Tr. 186), and not even a quarter of a mile” (Tr. 187). He stated his Smithfield operation probably had two toilets that were in compliance (Tr. 184 - 185).

In reply to a bench question regarding discretion on his part to allow the respondent to use the McDonald’s facility, Inspector Bower replied as follows at (Tr. 186):

THE WITNESS: There is discretion. If there’s a – if there’s – within a quarter or half mile, they can take a short, either walk or ride to get to a bathroom, there’s a gas station off the mine, that’s fine.

MR. GENDRON: It’s an eighth of a mile.

THE WITNESS: I asked, What’s the closest facility? And actually, sometimes there are houses nearby, really, close enough, again, readily accessible to mine personnel.

Absolutely, there's discretion in that standard. There was no Porta-Potty. And it's my understanding that there was nothing reasonably accessible. And I usually look at about a – a judgment, a mile, a mile and a half, whatever, two miles, if it's that far away.

Robert Dow, Supervisory MSHA inspector, testified that he has been employed by MSHA since May, 1993, and has served as the supervisor of ten inspectors at the Manchester, New Hampshire, field office since June, 2007, and he explained his duties (Tr. 188-189). He stated that he became familiar with this case on April 14, when inspector Bower called him and informed him of the conditions that he found at the respondent's plant. After discussing jurisdiction, how long the plant had existed, when it had operated after 2003, when it had closed, and the fact that it had operated again. He agreed with the need to conduct a full inspection (Tr. 190).

Mr. Dow explained the procedures and availability of MSHA compliance assistance visits (CAV) that is "a courtesy" inspection conducted by an individual who is not an authorized inspector and who is assigned to MSHA's small mines office of the educational field service division. They are not authorized to issue citations that authorized inspectors are required to issue when they observe any violation. He confirmed that CAV inspections were made at the respondent's pit during 2001, but not since that time, and that any follow-up regular inspections are not CAV inspections (Tr. 191-193).

With respect to Citation 8647634 concerning the Murray fuse box (Ex. P-9), Mr. Dow reviewed the photograph of the panel and described the large openings on the face that would allow access to energized components that could possibly result in accidental contact with energized conductors and electrical injury (Tr. 94). He believed these conditions are covered by Section 56.12002, requiring electrical equipment to be of approved design and construction and properly installed, and he explained as follows at (Tr. 195):

This one, especially 634, in the photograph, that is basically – it looks like a modified breaker panel. Because usually we see these types of panel, they have the breaker switches. This large opening here is very unusual.

Also, to have the plug in – the screw-in fuses, we normally see this type of panel with the switch-type breakers.

This is a very unusual, to see an opening that large, it almost looks like that breaker panel has been altered at some point.

Mr. Dow confirmed that his opinion and conclusion that Section 56.12002, was properly cited is based on the fact that given the size of the panel box openings, it was not properly designed and installed, and if it was, the openings would not be as large as shown. He agreed that

this is not explained on the citation form and that “it probably should have been a little more detailed (Tr. 193-194).

Mr. Dow stated that the cited fuze box “is actually part of the violation of the lower end, the smaller opening, getting in there you have the wires”, and that the box is within the meaning of “electrical equipment” stated in Section 56.12002, “a broad statement covering a wide variety of electrical equipment” (Tr. 197). He believed inspector Bower focused on the large box openings and that “the installation process was not of a caliber to protect the miner” (Tr. 198).

With regard to Citation 8647643 (Ex. P-10) concerning the missing knockout plug from the top of the electrical disconnect box, Mr. Dow stated that inspector Bower probably looked at Section 56.12032, requiring equipment and junction boxes and cover plates be kept in place at all times, except during testing or repairs (Tr. 198). He did not believe that inspector Bower should have cited Section 56.12032, because the knockout hole opening would not be used for the purpose of looking inside, and was part of the structural part of the top section of the box and was therefore not properly constructed. He explained that the entire disconnect box is an electrical component with the disconnect lever arm on the right side and it used to shut down power. In his opinion, the entire disconnect box is a switch and he agreed that the condition or practice should have been expanded with more detail (Tr. 199-201). The respondent did not question Mr. Dow about the aforementioned citations (Ex. P-9, P-10).

The respondent asserted that no production takes place at the pit and he referred to photographs of the scale house that has been inoperative for over ten years (Tr. 203). Note: the photographs were not supplied or introduced as evidence during the hearing. However, the respondent mailed them to the Court and copies were provided to the Secretary’s counsel by the Court and are part of the file, not the official trial record.

The respondent stated that the plant has not been in production, and has had no pit sales, since April of 2011, when the citations were issued, as well as the earlier years beginning in 2001. He stated that when the pit was in operation, materials were processed and left the plant through the scale house and were delivered across to the concrete plant (Tr. 203-204). He explained that in 2003, MSHA Inspector John Newby came to the pit and met with him and his son who manages the company and informed them that he was “tired of visiting the property for nothing, . . . and you’d better close this place or start running it”, and that “we explained to him, there’s no market down there.” The inspector then told him to close the plant (Tr. 205). Mr. Dow identified inspector Newby as his former supervisor from MSHA’s Springfield office and stated that he did not train him, had no daily contact with him, and had no knowledge as to what he may have discussed with the respondent (Tr. 203-204).

The respondent further stated that he agreed to do whatever inspector Newby required, including calling MSHA if he ran the plant, and to inform any inspector that came to his Springfield operation. The respondent stated he and his son kept their word and informed inspector Bower about the Wood River plant, even though he did not know about that operation (Tr. 206).

The respondent confirmed that he informed inspector Newby about his desire to go to the plant for an hour or two intermittently to service the conveyors, and that it did so for a couple of years once or twice every two or three months, and in February, 2011, when he took inspector Bower to the pit site and at 2:30 and they stayed until 5:30 or 6:00 p.m., when he finish his work. He commented that Mr. Bower was “diligent and competent” and that “I have no repercussions with Mr. Bower. He’s doing his job”. The respondent further commented “I feel the facility is being misjudged and we’re just not there. I wish we were” (Tr. 207).

Mr. Dow stated that inspector Bower conducted his April 14, 2011, inspection based on information that the plant had operated “even though in a small form, and not for an extended period of time, exposure” (Tr. 210). The respondent replied “I have no argument” (Tr. 210), and that he did not intend to present anyone else to testify in this case (Tr. 226). He reiterated that all of the violations at the pit, as well as the Smithfield plant, were corrected within 24 hours and had nothing further to say (Tr. 221-222).

The respondent confirmed that while the pit is currently shut down, he may go there occasionally “to get some gravel” as he explained when he filled out an MSHA ID form. He further stated that he has had two MSHA mine ID numbers and cancelled an active number at the direction of the last inspector in connection with a 2013 inspection (Tr. 208).

Mr. Dow stated that an attempted E-28 inspection occurred on January 10, 2013, and that the respondent has a mine ID number. However, he stated “I believe it’s been put into temporary idle” (Tr. 209). The respondent explained that when the inspector came to the pit at that time in 2013, he inquired why he was not at the site, and that he informed the inspector that “we never go there” (Tr. 209). This is consistent with the respondent’s statements that an inspector went to the site two or three times in 2013, and found no one there and suggested that the pit be closed so “he would not have to keep come here for nothing” (Tr. 45).

The respondent alluded to two citations that were mailed to him by MSHA in 2012 and 2013. He stated that the inspector in 2012 checked the gravel bank and instructed him to remove two batteries that were on the ground and informed him he would have to issue a citation (Tr. 45). He produced a Section 104(a) non - S & S Citation No. 8712111, issued on January 10, 2013, by inspector David A. Levesque for an alleged violation of Section 56.1000, for failure to notify MSHA’s Manchester field office of the current status of the pit. The citation was terminated on February 5, 2013, after the respondent faxed a notice that the pit was open for sales. A copy of the notice states that the pit was engaged in “open-sales, processing “RAP” or loam only”. (The citation issued to the pit reflects mine ID No. 37-00191, the same ID number reflected on all of the citations in this case.)

## FINDINGS AND CONCLUSIONS

### Jurisdiction

Throughout this proceeding the respondent has taken the position that its Wood River Pit was not subject to the Secretary's enforcement jurisdiction based on its arguments stated in its September 13, 2011, answer to the Secretary's civil penalty assessment petition. In that answer, the respondent argued that the Wood River Pit was closed for five years, had no sales during 2008 through 2010, as well as up to August of 2011, and that the pit was locked down for the most part when the inspection of April 14, 2011, took place.

The respondent's answer further referred to an "agreement" with MSHA not to operate the pit for more than one hour a year in order to rotate the belts and create movement in the gear cases and to disclose the pit location to all inspectors. Mr. Gendron, Sr., further explained his discussions with an MSHA inspector in 2003, at the pit, and while Inspector Dow confirmed that the individual was his former supervisor he had no knowledge of what may have transpired at that time (Tr. 203-207).

Subsequent to the hearing and the close of the record, Mr. Gendron, Sr., on June 4, 2013, mailed several photographs of the location and condition of the pit scale house with a statement that "it had not operated for over a decade, and that it is impossible to sell a finished product without a scale at the Pit." The Court furnished copies of the photographs and statements to the Secretary for information, but they were not received as part of the hearing record and remain as part of the file.

Mr. Gendron questioned Inspector Dow concerning MSHA's jurisdiction in the absence of any sales (Tr. 201-208), but nonetheless conceded that when the pit operated it moved and processed sand and gravel that was transported through the scale house and across the street to a concrete plant for its customers (Tr. 203).

Although Mr. Gendron stated that "those citations shouldn't exist because that plant is locked out" (Tr. 206), he admitted that "for a couple of years I would go once or twice every two or three months", as well as in February, 2011" (Tr. 207). He further stated that the pit is shut down, but he occasionally goes there to get gravel and still has an active mine ID number (Tr. 208).

Inspector Bower's conclusion that the pit was active prior to his April 14, 2011, inspection, and at least in February of that year is based on circumstantial evidence of signs of activity as shown in photographic exhibits P-2 and P-4, and his field notes that reflect that Mr. Ron Gendron, Jr., informed him that the pit was his father's "sand box", supplied bank gravel, and operated in February, 2011, to produce 50 yards of material for sale to the town of Smithfield after it ran out of winter sand. (Mr. Gendron, Jr., did not appear in this case.)

Although Mr. Gendron, Sr., denied that the pit operated for six hours in February, 2011, he conceded that it was operated for at least one hour that day to free snow and ice from the feeder; that three hours were expended to make the loader operational; that the conveyors were turned; and that “something had taken place”, including the movement of at least two loads of gravel. He further admitted that he was “trying to produce sand” for the city of Smithfield that day, and the plant was available for use (Tr. 41-43; 109-111).

Based on all of the aforementioned circumstances, the Court concludes that although the respondent’s Wood River Pit has operated for many years on a rather sporadic, intermittent cycle bordering on abandonment, with little proven substantial production or sales, it was nonetheless available for use with functioning equipment and machinery, including the periods it was locked down and could not be inspected, and in particular in February, and on April 14, 2011, at the time of the inspection. Accordingly, the Court finds and concludes that the respondent’s Wood River Pit was subject to the enforcement jurisdiction pursuant to the Mine Act at all times relevant to this case, and the respondent’s arguments to the contrary are rejected.

### The Alleged Violations

The only alleged significant and substantial (S & S) violation is Citation No. 8647637, citing Section 56.11001, for the failure to provide a safe means of access to a fixed ladder that provided access to the screen plant elevated walkway. Inspector Bower confirmed that the ladder railings provided sufficient stability (Tr. 116). His safety concern was the sloped area along the base of the ladder and elevated walkway consisting of loose sand materials that he believed would not provide a level footing for anyone walking to access the ladder, thereby posing a potential fall of approximately six feet down the slope (Tr. 120-124).

A significant and substantial (“S&S”) violation is described in Section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” A violation is properly designated S&S “if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that in order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove:

- (1) the underlying violation of a mandatory safety standard; (2) discrete safety hazard-that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); see also, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F3d 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power, Inc. V. Secretary*, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987)

The Court finds that although the inspector’s notes describe the cited conditions, and include notations regarding gravity and negligence, there is no comment or notation that the violation is significant and substantial (S&S), a notation that is usually made by inspectors as part of their notes (Ex. P-13). Although the inspector stated that he reviewed all of the violations with the respondent, he could find nothing in his notes relative to any access questions (Tr. 115). The Court further notes the absence of any testimony by the inspector explaining or distinguishing his “reasonably likely” gravity S&S determination, particularly in view of his “unlikely” gravity non-S&S determinations in connection with nineteen other citations.

The citation reflects that the ladder was accessed “as needed” to cleanup spillage and service, and the inspector had no evidence that it was accessed on the one day in February, 2011, or any other day. He nonetheless still believed that “one time is too much without taking corrective action” (Tr. 114).

The Court concludes and finds that the petitioner’s credible evidence establishes a violation of the cited Section 56.11001, and satisfies the first prong of the Mathies test. The Court further concludes and finds that the failure to provide safe access as charged presented a discrete safety hazard satisfying the second Mathies test.

The inspector noted that “after ten years of inactivity”, it was possible that the sloped materials were washing out and accumulating because “this place hasn’t been used in ten years” (Tr. 115). Further, there is no evidence that anyone other than Mr. Gendron, Sr., worked at the pit

with any regularity. The record reflects that he took immediate action in removing the ladder and relocating access to the platform to another area by installing a stairway, eliminating any access hazard.

With respect to the third prong of the Mathies test requiring the establishment of a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury, an evaluation of the risk of injury necessarily assumes the continuance of normal mining operations based on the facts of the particular case. In the instant matter, the evidence establishes many years of pit inactivity, with sporadic or no meaningful production, including period when the pit was either shut down, idled, or locked out with limited or no power prior to the inspection of April 14, 2011, and subsequently for two years, except for one unspecified day in February, 2011, and for two subsequent years until the hearing on May 29, 2013.

Based on the foregoing findings and conclusions, the Court finds no credible evidence to support any reasonable expectation by the inspector that the pit would likely continue to operate with a reasonable expectation and likelihood that the hazard will result in an injury. Accordingly, I cannot conclude that the third and fourth prongs required by the Mathies test have been established. The violation IS MODIFIED and AFFIRMED as a non-S&S violation.

Citation Nos. 8647634, 8647643, and 8647641

In the course of the hearing in this case, the Court questioned the adequacy and sufficiency of the inspector's narrative descriptions of the "condition or practice" as stated on the face of the citations with respect to Citation Nos. 8647634 and 8647643; and whether or not the condition or practice described by the inspector with respect to Citation No. 8647641, constituted adequate "notice" with respect to the alleged failure by the respondent to examine each working place for conditions adversely affecting safety (Tr. 91, 94, 143, 225-226).

Citation Nos. 8647634 and 8647643

After careful review of the hearing transcript and the arguments presented by the Secretary in support of the interpretation and application of the cited Section 56.12002, including the credible testimony of the inspectors, the Court concludes and finds that the Secretary has established the violations by an un rebutted preponderance of the credible evidence of record.

The Court credits the testimony of inspectors Bower and Dow that the cited electrical disconnect box with a missing knockout plug, as well as the electrical service panel with a fuse box were switching electrical devices that constituted electrical equipment or controls within the meaning of Section 56.12002, and that the cited unprotected openings in the electrical service panel, as well as the missing knockout plug, presented potential inadvertent hazardous electrical contact with anyone accessing that equipment. Under the circumstances, the Court credits the inspectors conclusions that the cited electrical equipment was not properly constructed on installed as required by Section 56.12002. Accordingly, the citations ARE AFFIRMED.

Citation No. 8647641

The Court takes note of the fact that inspector Bower did not ask for or review any pre-shift examination reports, and while he testified that his notes contained no reference to any workplace examination (Tr. 141), his notes state that “Daily workplace examinations conducted at the mine site were not complete and thorough”, and that “mine operator conducts workplace exams when on site, but his father (Ron Gendron, Sr.), does not follow 56.18002”. The notes further state that mine management (Ronald Gendron, Jr.) did not conduct spot checks to ensure that the examinations were done properly, and “got lax due to very limited activity” (Ex. P-15).

The Court finds that the inspector issued the violation based on the assumption that a competent examination was not done in light of the 13 violations that could have been discovered had a complete and effective examination been conducted (Tr. 141). Although the inspector’s notes reflect that the respondent generally conducts workplace examinations in compliance with Section 56.18002, the Court finds that the inspector took this into consideration as a mitigating factor in support of his moderate negligence finding.

After careful consideration of the Secretary’s arguments with respect to this citation, the Court finds that unlike a situation in which an inspector and the person designated to conduct the required examination view the alleged hazardous condition and express conflicting opinions or judgements, on the facts of this case, the credible evidence supports the inspector’s determination that no workplace examination was conducted by Mr. Gendron, Sr., the operator and only person working at the pit on April 14, 2011, who was available to conduct the examination on that day, and could have presented any evidence to establish that he conducted an examination. Under the circumstances, the violation IS AFFIRMED.

Citation No. 8647640

The inspector’s brief description of the condition or practice allegedly in violation of Section 56.20008(a), states “There were no company or public toilet facilities immediately available, leaving personnel with no sanitary toilet facilities to use if needed”.

The Court notes that the rather vague one sentence regulatory standard language does not include the words “public” or “immediately available”. It simply requires toilet facilities that are readily accessible to mine personnel. The inspector’s determination that an immediately unavailable public toilet constituted a violation clearly implies or suggests that an available public facility would constitute an alternative method of regulatory compliance.

The inspector’s notes state that there was no prompt access to sanitary facilities and that the respondent was not fully aware of the toilet requirements and did not believe a toilet was required at the pit location based on limited hazard exposure. The inspector further noted that pit visitors would be affected by the lack of a toilet even though the standard, on its face, only requires accessibility to mine personnel. The record establishes that the respondent purchased a

portable toilet for \$100, in order to abate the pit violation, and that its Smithfield location was equipped with toilet facilities (Tr. 185, 187).

Inspector Bower testified that he was unaware of any MSHA toilet facility policy or guidelines with respect to the interpretation and application of Section 56.20008(a). He confirmed that he may exercise his discretion and judgement with respect to the question of whether an off-site toilet facility was “reasonably accessible”, and stated there is “absolutely, discretion in that standard” (Tr. 186).

The inspector further explained that off-site toilet locations within “a quarter or a half-mile, they can take a short, either walk or ride to get to a bathroom, there’s a gas station off the mine, that’s fine” (Tr. 186). He further stated “actually, sometimes there are houses nearby, really, close enough, again, readily accessible to mine personnel” (Tr. 186). His explanations were in response to the Court’s question whether the use of a toilet at a McDonald’s across the street from the pit would be acceptable and within his discretion (Tr. 185).

The respondent, Mr. Gendron, Sr., stated that a McDonald’s restaurant located around the corner “an eighth of a mile, to less than a quarter of a mile” from the pit was available for his use. The Court notes that the record reflects that Mr. Gendron, Sr., would be the only person at the pit. When asked if an inspector would have access to any toilet at the pit and whether he would charge the inspector for its use, he stated as follows:

“It’s a hundred acres. It’s all woods . . . we have a McDonald’s around the corner. We usually go there for breakfast and we go back to the pit, and that’s how it works” (Tr. 184).

Based on the facts of this case, and in particular the inspector’s testimony with respect to his understanding of the interpretation and application of Section 56.20008(a), with respect to the respondent’s pit location that the Court finds has had virtually little or no active production on April 14, 2011, on the day of the inspection, one day in February of that year, and for several prior years when it was non-productive and locked out, the Court concludes and finds that the Secretary has not established a violation by a preponderance of the credible evidence.

The Court credits the un rebutted testimony of the pit operator Ron Gendron, Sr., the only individual working at the pit, that he, and possibly another inspector, regularly used the McDonald’s restaurant located an eighth of a mile, to less than a quarter of a mile from the pit, a distance well within the distances the inspector in this case conceded would be acceptable for compliance, provided a readily accessible toilet facility that the Court finds constituted meaningful, logical, realistic, and substantial compliance with the rather vague cited standard. Accordingly, the citation IS VACATED.

Citation Nos. 8647621, 8647622, 8647628, 867626, 8647627, 8647633, 8647636, 8647642, 8647637, 8647638, 8647635, 8647630, 8647631, 8647632

Inspector Bower testified credibly that after he issued the citations, he met with the respondent's operator, Ronald Gendron, Jr., the next day on April 15, 2011, and reviewed all of the citations with him and that Mr. Gendron did not dispute or challenge his findings and informed him that he would take corrective action and did so (Tr. 23). Mr. Gendron, Jr., did not appear to testify in this case.

The Court takes note of the fact that Mr. Gendron, Sr., confirmed that he did not intend to call any other witnesses to testify in this case (Tr. 226), and that he opted not to file a brief (Tr. 229). He took the position that all of the violations were corrected with 24 hours, has never had any accidents, and that he had nothing more to say (Tr. 221-223). He stated that Inspector Bower was diligent and competent and that he had "no repercussions" with him and recognized "he was doing his job" (Tr. 207).

The Court finds that the respondent's defense to the aforementioned citations focused on its arguments concerning jurisdiction based on little or no sales over many years at the pit location, mitigating circumstances dealing with negligence, gravity, rapid compliance, and its good safety record, rather than any substantive evidence with respect to whether or not the conditions cited were in fact violations of the cited standards.

The Court finds and concludes that the credible testimony and evidence presented by the Secretary establishes that each of the aforementioned violations have been established by a clear preponderance of the evidence. Accordingly, all of the determinations made by the inspector with respect to these citations, ARE AFFIRMED.

#### History of Prior Violations

Supervisory Inspector Robert Dow testified that the respondent has a very good safety record (Tr. 223). MSHA's Inspection Summary Report (Ex. P-3(b)), associated with the citations in issue in this case reporting inspections from March 2, 2001, through January 10, 2013, reflects no violations from March 2, 2001, through March 14, 2003.

With the exception of one citation issued between July 9-11, 2001, during a regular inspection, the report also notes numerous attempted inspections, compliance assistance visits and other compliance activities. Also listed is one order issued during May 4-12, 2011. No further information was produced with respect to this information. Based on all of this information, the Court finds and concludes that the respondent's compliance history does not warrant any increased civil penalty assessments.

With respect to a June 26, 2012, citation issued during a "regular inspection", and a January 10, 2013, citation during a "mine idle inspection", as reflected in the aforementioned report, they are not part of this case. As previously noted, the respondent alluded to these citations

(Tr. 45), and Inspector Dow confirmed an attempted inspections on January 10, 2013, and believed the mine has been placed on temporary idle (Tr. 209).

### Good Faith Compliance

The evidence establishes that all of the cited conditions were timely abated, and respondent asserted all of the conditions were corrected within 24 hours. Further, the Secretary and Inspector Bower confirmed the violations were timely abated in good faith (Tr. 23-24).

### Gravity

The record reflects that nineteen (19) citations were issued non - S & S citations, with the exception of Citation No. 8647837, for a violation of Section 56.11001 (Ex. P-13), for a failure to provide a safe means of access to a working place. That citation was issued as a significant and substantial (S & S) violation. The Court AFFIRMS all of the non - S & S determinations with respect to the nineteen citations, and has modified Citation No. 8647837 to a non - S & S violation.

### Negligence

The inspector determined that eighteen (18) of the citations were the result of moderate negligence, and that two (2) (8647621 and 8647635) were the result of low negligence. The Court AFFIRMS all of these findings.

### Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Remain in Business

The Court concludes and finds that the respondent is an extremely small sand and gravel facility operated by a father and son (Ronald Gendron, Sr., and Ronald Gendron, Jr.). The Secretary agreed that based on MSHA's Inspection Summary Report (Ex. P-3), for three quarters of the year 2011, reflecting 145 annual hours of operation, including office workers at the strip, quarry, open pit, and mine site, reflects "an extremely small operation" (Tr. 32).

MSHA's mine status report (Ex. P-3(b)), reflects the year 2011 mine status as "intermittent", with 145 annual product hours from February 1 through April 14, 2011, the date of the inspection in this case, with one employee at the Wood River Pit. Notwithstanding all of the aforementioned information, the Court concludes that the penalty assessments made by the Court will not adversely affect the respondent's ability to pay those assessments.

### Penalty Assessments

After careful consideration of all of the evidence and the facts in this case, including the civil penalty assessment criteria set forth in Section 110(I) of the Mine Act, including the Court's discretion as recognized by the Secretary's counsel in the course of the hearing at (Tr. 212) in this case with respect to the assessment of civil penalties, independent of the statutory minimums

applicable to the Secretary, the Court finds and concludes the penalty assessments determined by the Court are fair and reasonable and that any increased penalties will not serve any realistic deterrent purposes.

The Court voices its disappointment with the failure of the parties to settle this case, and recognizes the efforts of the Secretary's counsel to achieve a settlement based on "purely a money issue with no discussion about the citations per se" (Tr. 212), with a focus on whether or not the Secretary would accept a 50 percent reduction in penalties, that the respondent agreed to pay, or a 30 percent reduction offered by the Secretary (Tr. 211-212). Given the shortage of available resources and in the interest of judicial economy, the Court respectfully suggests that the parties address the concerns of the Court with respect to any future settlement negotiations.

ORDER

Based on the foregoing findings and conclusions in this case, and in consideration of the civil penalty criteria set forth in Section 110(I) of the Mine Act, the Court assesses the following civil penalties for all of the following violations that have been AFFIRMED:

<u>Citation No.</u>		<u>Citation No.</u>	
8647621	\$50	8647634	\$50
8647622	\$50	8647635	\$75
8647626	\$50	8647636	\$50
8647627	\$50	8647637	\$50
8647628	\$50	8647638	\$50
8647629	\$50	8647639	\$50
8647630	\$75	8647641	\$75
8647631	\$50	8647642	\$50
8647632	\$50	8647643	\$50
8647633	\$50		

Section 104(a) non - S & S Citation No. 8647640, issued on April 14, 2011, 30 CFR 56.20008(a) IS VACATED and the proposed penalty of \$100 IS DISMISSED.

Section 104(a) S & S Citation No. 8647637, issued on April 14, 2011, 30 CFR 511001, IS MODIFIED to a non - S & S citation.

The Respondent is ORDERED to pay a total civil penalty assessment of \$1,025.00, in satisfaction of the aforesaid violations issued in this matter. Payment shall be made within thirty (30) days of the date of this decision, and remitted by check made payable to U.S. Department of Labor/MSHA, P.O. Box 790390, St. Louis, MO 63179-0390. Upon receipt of payment, this matter IS DISMISSED.

/s/ George A. Koutras  
George A. Koutras  
Administrative Law Judge

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Mr. Ron Gendron, J. Santoro, Inc., 79 Cedar Swamp Road, Smithfield, RI 02917

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 Pennsylvania Avenue, NW, Suite 520N  
WASHINGTON, D.C. 20004-1710

October 28, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2012-242
Petitioner	:	A.C. No. 15-19027-270522
	:	
v.	:	
	:	
IKERD MINING CO., LLC,	:	Mine: Flatwoods
Respondent	:	

**DECISION**

Appearances: Latasha T. Thomas, Esq., U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;  
Dan Thompson, Esq., Somerset, Kentucky, on behalf of Ikerd Mining Company, LLC.

Before: Judge Zielinski

This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petition alleges that Ikerd Mining Company, LLC, is liable for two violations of the Secretary’s Mandatory Safety Standards for Surface Coal Mines, and Surface Work Areas of Underground Coal Mines,<sup>1</sup> and proposes the imposition of civil penalties in the amount of \$105,000.00. A hearing was held in London, Kentucky, and the parties filed post-hearing briefs.<sup>2</sup> For the reasons that follow, I find that Ikerd committed the violations and impose civil penalties in the total amount of \$46,000.00.

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<sup>1</sup> 30 C.F.R. Part 77.

<sup>2</sup> A Briefing Order, entered on August 29, 2013, directed that post-hearing briefs be filed on or before September 30, 2013, and that any reply briefs be filed on or before October 14, 2013. The Secretary filed a brief on September 30. Respondent did not file a brief within the time allowed. On October 1, most government operations were shut down due to a Congressional budget impasse that continued through October 16. On October 21, Respondent filed a Motion to File Brief, along with a tendered two-page brief. The motion noted only the fact of the government shut-down, and did not offer a justification for Respondent’s failure to timely file the brief. The Secretary determined not to oppose the motion. Respondent’s motion is granted, and the brief is accepted for filing.

## Findings of Fact and Conclusions of Law

At all times relevant to the violations at issue, Ikerd operated the Flatwoods Mine, a surface coal mine in Clay County, Kentucky. In December 2010, it opened a new section of the mine, approximately one mile from its ongoing operations. In order to reach the new site, a road had to be constructed through rugged terrain. Track mounted equipment, excavators and dozers, were initially used for road construction and site preparation. In early February 2011, Ikerd began using haul trucks at the site. The trucks would travel the newly constructed road to the site in the morning, and return for refueling at the end of the day. However, the road to the site was too steep for the trucks to climb without assistance, particularly one section through a hollow that had a 39% grade. At the beginning of the shift, the trucks would descend to the low point of the road, raise their beds, and a dozer would push them up the steep portion of the road to the work site. The process would be repeated in the evening when the trucks traveled back to the re-fueling site. Trucks were empty when they traveled the road, and Ikerd was in the process of improving the road to make it less steep.

On February 15, 2011, a truck operator with 2-3 years of experience, began to work at the site. He operated a truck that had been out of service for approximately two weeks while a hydraulic pump was replaced. The operator's first day at the site was unremarkable, until the shift ended and he attempted to return to the refueling site. As he descended the steepest part of the roadway, he lost control of the truck, which rolled up on a berm and "barrel-rolled" off the opposite side of the road. Tr. 24. The truck landed on its side, 20 to 30 feet below the road surface. Photographs of the accident scene were introduced into evidence. Ex. G-3. An on-board computer, that recorded information about the truck's operation, disclosed that the driver had started down the grade in second gear, rather than first, which may have been a contributing factor to the accident. Tr. 15, 39. The driver suffered a fractured rib, a fractured collarbone, and a wound on his forehead that required 17 stitches to close, injuries that were expected to prevent his return to work for at least 30 days.

David A. Faulkner headed MSHA's investigation of the accident, which was conducted the following day.<sup>3</sup> In informal interviews, the driver indicated that the brakes on the truck were not functioning properly, and that he had advised the mechanic of the problem but had not noted it on his pre-operational examination report. After the truck was recovered, Faulkner examined it and noted the presence of rust and other material accumulated on the right front brake disc and caliper. The left front disc and caliper showed normal wear, and Faulkner concluded that the right front brake was not operational. The condition of the brake components are depicted in photographs. Ex. G-3F, G-3G.

Faulkner interviewed Billy Conway Speaks, the mine superintendent, who readily admitted that he had conducted workplace examinations of the roadway and work site and was well aware that the road was too steep for truck travel. Tr. 13, 20. The road was used as a

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<sup>3</sup> Faulkner has 17 years of mining experience, including experience as a truck driver and mechanic. He joined MSHA in 2006.

matter of necessity, because it was the only means of accessing the new work site. Faulkner was aware of regulatory guidelines that provided for a maximum road slope of 10%, with 15% permitted for short distances. He was also aware of information provided by the truck manufacturer that the recommended maximum grade for operation of the truck was 17%.<sup>4</sup> Tr. 36. The 39% grade, which dictated that the trucks be pushed uphill by a tracked piece of equipment, was clearly a hazardous condition, as Speaks conceded. Tr. 13, 20.

On April 27, 2011, at the conclusion of the investigation, Faulkner issued the two citations at issue, citing the failure to report and correct the truck's defective brakes, and the failure to report and correct the hazardous condition of the roadway. Ikerd timely contested the civil penalties assessed for the violations.

Citation No. 8353675

Citation No. 8353675 was issued pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 77.1606(c) which requires that mobile haulage equipment be inspected before being placed in operation and that equipment defects affecting safety be reported and corrected before the equipment is used. The violation was described in the "Condition and Practice" section of the citation as follows:<sup>5</sup>

As the result of an accident investigation the following defect affecting safety has been recognized to exist on the Caterpillar 773F haul truck, S/N EED00786, without being corrected before the truck was placed into operation on 02-15-2011: (1) The right side front steering axle brake assembly is operating improperly. Photos taken after the accident reveal the brake caliper to be covered with materials indicating that the brake capacity is restricted or limited. Without properly operating brakes the operator will lose control resulting in a serious accident.

Ex. G-1.

Faulkner determined that the violation had resulted in a lost work days or restricted duty injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$52,500.00 was specially assessed for the violation.

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<sup>4</sup> It is unclear whether the guidelines and recommendations were intended for empty or fully loaded trucks.

<sup>5</sup> Grammar and spelling errors have been corrected in quotations from documents prepared in the field.

## The Violation

The haul truck was inspected by the driver prior to being placed into service. He told Faulkner that he identified a problem with the front brakes and that the mechanic knew about the problem. However, it was not recorded on the pre-operational check list, and was not reported, by either the driver or the mechanic, to the mine operator. Tr. 33. Speaks was unaware of the problem with the truck's brakes. Tr. 14. He questioned whether the driver had "calibrated" the brakes properly, by use of a valve in the cab of the truck. Tr. 14,16. The precise nature of the "calibration" process was not explained. Faulkner concluded that the right front brake was not operational, based upon his observation that the brake disk on the right side showed no signs of wear. Tr. 33-34, 38.

Faulkner's conclusion that the truck's right front brake was not operational appears reasonable, and is confirmed by the photographs, and the verbal report of the driver. As such, it was a defect affecting safety that should have been corrected before the equipment was used.

Ikerd argues that it "did not violate 30 C.F.R. 77.1606(c) because the [brake] defect was not known and could not have been known by Ikerd." Resp. Br. at 1. While, as noted *infra*, Ikerd is not charged with knowledge of the defect, that is no defense to liability. It is well-settled that the Mine Act imposes liability for a violation of a standard against an operator without regard to fault. *E.g. Ames Construction, Inc.*, 33 FMSHRC 1607, 1611 (July 2011) (citing *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C.Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)).

I find that the standard was violated.

## Significant & Substantial

The Commission reviewed and reaffirmed the familiar *Mathies*<sup>6</sup> framework for determining whether a violation is S&S in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65 (Oct. 2011):

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:

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<sup>6</sup> *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Id.* at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984).

....  
....

The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id.* at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id.* The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of injury. *Id.* The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

A violation of a safety standard has been established. It contributed to a hazard, that a miner's ability to maintain control of the truck would be impaired. The occurrence of an event resulting in injury was reasonably likely, if not highly likely, and, in fact, occurred. Any injury resulting from loss of control of the truck would be reasonably serious, if not fatal, as were the injuries sustained by the truck operator. I find that the violation was S&S.

## Negligence

Faulkner concluded that Ikerd's negligence was moderate, primarily because the problem with the brakes had not been reported to Speaks, who was unaware of it. Speaks had been told by the mechanic that the truck "was ready to go," after the hydraulic pump had been replaced. Tr. 22. The truck's rear brakes apparently functioned, and the front brakes were partially operable. Faulkner conducted interviews of the involved individuals and concluded that neither Speaks, nor any other member of the mine's management, was aware of the brake problem. I find that Ikerd's negligence with respect to the violation was low to moderate.

### Citation No. 8353676

Citation No. 8353676 was issued pursuant to section 104(d)(1) of the Act. It alleges a violation of 30 C.F.R. § 77.1713, which requires that at least once during each working shift, each active working area and each active surface installation shall be examined by a certified person and any hazardous conditions found must be reported to the operator and corrected. Records of such examinations must be signed by mine managers, and must include the nature and location of any hazardous conditions found, and the action taken to abate the conditions. The violation was described in the "Condition and Practice" section of the citation, as amended, as follows:

As the result of an accident investigation involving a Caterpillar 773F haul truck that occurred on 02-15-2011, it is determined that the operator failed to record a daily examination that correctly identified hazards as observed for the active work areas, roadways and active travelways of this mine. The investigation revealed roadway grades measuring up to 39% were allowed to exist adjacent to and prior to the location of the accident without being recorded or corrected. During informal interviews conducted on site on 02-16-2011, the mine Superintendent stated that he knew the roadway was too steep but had no other access to the work area for the haul truck. The haul trucks have traveled the roadway approximately seven shifts with no record of the hazardous condition. The mine Superintendent engaged in aggravated conduct by acknowledging a safety hazard and failing to take corrective action. At least once during each working shift, or more often if necessary for safety, each active working area shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-2.

Faulkner determined that the violation had resulted in a lost work days or restricted duty injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was high, and rose to the level of unwarrantable failure. A civil penalty in the amount of \$52,500.00 was specially assessed for the violation.

### The Violation

Through post-accident interviews, Faulkner determined that Speaks had conducted workplace examinations, and was well aware of the hazardous condition of the roadway.<sup>7</sup> He had not recorded the condition on reports of the examinations, and the condition had not been corrected before rubber-tired haul trucks were allowed to operate on the road. The standard was violated.

### S&S

The violation contributed to a discrete safety hazard, that a driver would lose control of a truck while traversing the steep portions of the road, resulting in an accident. Truck drivers used the road twice each day for at least one week, and the hazard was reasonably likely to, and in fact did, result in a serious injury. The violation was S&S.

### Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). It is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). It is conduct that is "not justifiable" or "inexcusable." *Utah Power & Light Co.*, 12 FMSHRC 965, 971 (May 1990), *citing Emery Mining*, 9 FMSHRC at 2001.

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering all of the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for

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<sup>7</sup> Ikerd argues that it did not violate the standard because it "did not fail to inspect the area on a daily basis." Resp. Br. at 1. The argument overlooks the fact that the citation was modified on April 27, 2011, by deleting an allegation that daily examinations had not been conducted. Ex. G-2.

compliance. See *Manalapan Mining Co.* 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C.Cir. 1999). While some factors may be irrelevant to a particular factual scenario, *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *Manalapan*, 35 FMSHRC at 293; *IO Coal*, 31 FMSHRC at 1351. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

There is little question that the violation was the result of Ikerd's unwarrantable failure. Through its mine superintendent, Ikerd had full knowledge of the existence of the obvious condition and the hazard it contributed to. It had existed for seven or eight shifts, and posed a high degree of danger to miners operating trucks on the roadway and any other person who might be struck by an out-of-control truck. While the operator was apparently not put on notice that greater compliance efforts were necessary, and may have been making improvements to the road, those factors are easily outweighed by those that strongly point to a conclusion that the violation was the result of Ikerd's unwarrantable failure.

#### The Appropriate Civil Penalties

As the Commission reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:

the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Under this clear statutory language, the Commission alone is responsible for assessing final penalties. See *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 (“[N]either the ALJ nor the Commission is bound by the Secretary’s proposed penalties . . . we find no basis upon which to conclude that [MSHA’s Part 100 penalty regulations] also govern the Commission.”). While there is no presumption of validity given to the Secretary’s proposed assessments, we have

repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g., Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

## Findings on Penalty Criteria

### Good Faith - Operator Size

The violation was promptly abated by prohibiting travel by rubber-tired equipment on the road. The parties stipulated that the mine produced 75,513 tons of coal in 2011, which placed it in the medium-sized category.

### History of Violations

Ikerd's history of violations is reflected in a report generated from MSHA's database, typically referred to as an "R-17." Ex, G-4. That report shows that Ikerd had 32 violations with a final order date between January 27, 2010 thru April 26, 2011. However, the overall violation history is deficient in that it provides no qualitative assessment, i.e., whether the number of violations is high, moderate or low. *See Cantera Green*, 22 FMSHRC 616, 623-24 (May 2000). Qualitative violations' history information can be found on assessment forms filed with the petition, which reflect that Ikerd had 34 violations that became final, and 23 inspection days, in the pertinent time period. The Secretary's Part 100 regulations for regular penalty assessments assign penalty points for total of violation history, ranging from 0 points for 0 to 0.3 violations per inspection day to 25 points for in excess of 2.1 violations per day. Under the regulations, Ikerd's history of violations was moderate, and I so find.

## Gravity - Negligence

Findings on gravity and negligence are set forth in the discussion of each violation.

## Ability to Continue in Business

The parties stipulated that the mine is temporarily idle. Stip. 5. Speaks testified that, to his knowledge, the mine has not been in operation for more than 2 years. He also indicated that Ikerd held several other mining permits, none in operation, and that he had heard that it was attempting “to get a contract mine going.” Tr. 18. Speaks knew of no substantial assets held by Ikerd that would allow it to pay the assessed penalties, that it was subject to a “reclamation obligation” of approximately \$500,000.00, and that it had no means to cover that obligation by mining “in this market.” Tr. 17-18. To his knowledge, Ikerd had no substantial resources, and was subject to outstanding judgments in the “millions” of dollars. Tr. 18-19. The record was left open to allow the submission of information as to Ikerd’s financial condition. Ikerd submitted, post-hearing, a copy of a “U.S. Return of Partnership Income,” IRS Form 1065, for the year 2011. That document has been made a part of the record, and designated exhibit R-1. The un-executed form, purportedly prepared by a CPA firm, reflects that Ikerd Mining, LLC, had a net ordinary business loss of \$4,381,951.00 for the pertinent period.

Aside from the fact that Speaks worked for Ikerd “off and on for 42 years,” his competency to testify regarding Ikerd’s financial condition is not apparent from the record. While it is not inconsistent with the information reflected on the tax return, it provides, at best, a shaky foundation for Ikerd’s claim that the imposition of the assessed penalties would adversely affect its ability to continue in business. Moreover the tax return presents an incomplete picture of Ikerd’s financial condition. One of the significant items comprising the business loss is a sum of \$4,738,329.00, on line 20 of the form, labeled “other deductions.” The form instructs that a statement explaining the amounts claimed is to be attached, and the return bears a notation “see statement.” No statement was attached to the copy of the return submitted by Ikerd. Schedule L on page 5 of the return shows “Total liabilities and capital” of \$15,767,878 at the beginning of the year and \$5,029,529 at the end of the year.

In the absence of proof that the imposition of penalties would adversely affect a mine operator’s ability to continue in business, it is presumed that no such adverse effect would occur. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994). The operator must, therefore, introduce specific evidence to show that the proposed penalties would adversely affect its ability to continue in business. *Broken Hill Mining Co.*, 19 FMSHRC 673, 677-78 (Apr. 1997). While this potentially mitigating factor may not be available to an operator that has gone out of business,<sup>8</sup> the “ability to continue in business”

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<sup>8</sup> Reduction of penalties in such circumstances could create an economic incentive to avoid a penalty by going out of business and perhaps, re-entering the mining business under a different business entity. *Unique Electric*, 20 FMSHRC 1119, 1123 (Oct. 1998); *Ember*

(continued...)

criterion is relevant to an operator that has ceased operations, but has not dissolved its business entity. In such cases, the issue to be considered is whether the penalties will adversely affect its ability to resume operations. *Spurlock* 16 FMSHRC at 700; *Georges Colliers, Inc.*, 23 FMSHRC 822, 826 n5 (Aug. 2001) (citing *Spurlock*).

The information presented as to Ikerd's financial condition is sketchy. Ikerd is no longer conducting mining operations, and the mine's status is listed as "temporarily idle" on MSHA's web site. It apparently intends to resume operations when and if economic conditions justify doing so, and Speaks believed that Ikerd may have been attempting to commence a contract mining operation as of the time of the hearing. Because of the cyclical nature of the mining business, tax returns showing operating losses for specific periods have been found insufficient to establish that proposed penalties would adversely affect an operator's ability to continue in business. *Sierra Rock Products, Inc.*, 35 FMSHRC 49 (Jan. 2013) (ALJ). Detailed evidence of an operator's precarious financial condition has also been rejected where the proposed penalties were a small fraction of its other debts, and there was no showing that the penalties, as opposed to other financial considerations, would threaten the operator's ability to continue in business. *Thueson Construction Co.*, 34 FMSHRC 2241, 2258-60 (Aug. 2012) (ALJ). In *Spurlock*, the Commission declined to reduce penalties based on the operators' "mere speculation" that the penalties would result in the imposition of judicial liens that would foreclose its ability to obtain financing. 16 FMSHRC at 700.

Accepting Speaks' "understanding" that Ikerd has substantial outstanding obligations, the information submitted falls far short of establishing that the proposed penalties of \$105,000.00 would adversely affect its ability to continue in business. No officer or official of Ikerd's testified as to its condition or its ability, or lack thereof, to re-enter the mining business. The status of Ikerd's assets, e.g., whether it owns equipment that could be employed in re-entering the mining business, is unknown. More importantly, Ikerd has proffered no explanation as to how imposition of the proposed penalties, which are considerably smaller than outstanding obligations mentioned by Speaks, would actually affect its ability to re-enter or to continue in business. I decline to reduce the proposed penalties based upon this factor.

#### The Secretary's Penalty Assessment Process – Special Assessments vs. Regular Assessments

The Secretary specially assessed penalties for both violations at issue. The total of the penalties assessed, \$105,000.00, is substantially higher than the approximately \$14,700.00 in penalties that would have been assessed pursuant to the Secretary's regular assessment formula. I discussed considerations involved in determining appropriate penalties at some length in a recent decision. *American Coal Company*, 35 FMSHRC 1774, 1819-24 (June 2013). That discussion will not be repeated here. However, the methodology set forth in *American Coal* for determining the amount of the penalty to be imposed for a violation will be followed here, and in future cases.

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<sup>8</sup>(...continued)  
*Contracting Corp.* 33 FMSHRC 2742, 2751-59 (Nov. 2011) (ALJ).

## Method for Determining the Amount of Penalties for the Litigated Violations

The purpose of explaining significant deviations from proposed penalties, as Commission judges are obligated to do, is to avoid the appearance of arbitrariness.<sup>9</sup> Similarly situated operators, determined to be liable for violations of similar gravity, negligence and other penalty criteria, ideally should not be assessed significantly different penalties. Absent some guideline, however, a judge has no quantitative reference point to aid in specifying a penalty within the current statutory/regulatory range of \$1.00 to \$70,000.00. The Secretary's regulations for determination of a penalty amount by a regular assessment, 30 C.F.R. §100.3, take into consideration all of the statutory factors that the Commission is obligated to consider under section 110(i) of the Act. The product of that regular assessment formula provides a useful reference point that would promote consistency in the imposition of penalties by Commission judges.<sup>10</sup>

Accordingly, in determining penalties for the litigated violations, the penalty produced by application of the Secretary's regular assessment formula will be used as a reference point, and adjusted depending on the particular findings with respect to the statutory penalty criteria. Other unique circumstances may dictate lower or higher penalties. Violations involving "extreme gravity" and/or "gross negligence," or, as previously stated in section 105(a) of the Secretary's penalty regulations, "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate substantially higher penalty assessments.<sup>11</sup> A party seeking a reduced or an enhanced penalty must assume the burden of producing evidence sufficient to justify any requested adjustment. Where the Secretary urges a penalty higher than that derived by reference to the regular assessment process, e.g., a higher penalty resulting from the special assessment process, he will have the burden of establishing the appropriateness of the higher penalty, based upon the statutory penalty criteria.

Citation No. 8353675

Citation No. 8353675 is affirmed as an S&S violation. A specially assessed civil penalty in the amount of \$52,500.00 was proposed for this violation. While the gravity of the violation was serious, the operator's negligence was low to moderate. Neither the gravity nor the operator's negligence justify a significant departure from the product of the regular assessment

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<sup>9</sup> *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

<sup>10</sup> See *Magruder Limestone Co., Inc.*, 35 FMSHRC 1385, 1411 (May 2013) (ALJ) (regular assessment regulations provide a helpful guide for assessing an appropriate penalty that can be applied consistently).

<sup>11</sup> The subject language, which was included in a list of factors that might justify a special assessment, was deleted in 2007. *30 C.F.R. Part 100 Final Rule*, 72 Fed. Reg. 13592 - 13,621 (March 22, 2007).

formula, which would have resulted in a penalty of approximately \$3,406.00. That formula assigns additional penalty points based on the fact that an injury actually occurred. However, here the injury was relatively minor considering that a fatality could easily have resulted. Considering the factors itemized in section 110(i), I impose a penalty of \$6,000.00 for this violation.

Citation No. 8353676

Citation No. 8353676 has been affirmed as an S&S violation and an unwarrantable failure to comply with the safety standard. A specially assessed civil penalty in the amount of \$52,500.00 was proposed for this violation. A penalty calculated under the Secretary's regular assessment formula would have resulted in a penalty of approximately \$11,307.00. The serious gravity of the violation, coupled with Ikerd's high negligence, justifies an enhanced penalty.<sup>12</sup> Considering the factors itemized in section 110(i), I impose a penalty of \$40,000.00 for this violation.

### ORDER

Based on the foregoing, it is:

**ORDERED:** That Citation Nos. 8353675 and 8353676 are **AFFIRMED**, and it is;

**FURTHER ORDERED:** That Ikerd Mining Co., LLC, pay civil penalties in the amount of \$46,000.00 within 45 days of this order.<sup>13</sup>

/s/ Michael E. Zielinski  
Michael E. Zielinski  
Senior Administrative Law Judge

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<sup>12</sup> While the violation was attributable to Ikerd's unwarrantable failure, its negligence was mitigated somewhat by the fact that the trucks used the road only twice per day, while unloaded. A driver could maintain control of a truck by using extreme caution, descending in first gear and using brakes as needed. The driver that was injured attempted to descend in second gear, and had not reported a problem with the brakes.

<sup>13</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390.

Distribution (Certified Mail):

Latasha T. Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street,  
Suite 230, Nashville, TN 37219

Dan Thompson, Esq., P.O. Box 857, Somerset, KY 47502

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19<sup>th</sup> Street, Suite 443  
Denver, CO 80202-2536  
303-844-3577

October 28, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2013-161-M
Petitioner,	:	A.C. No. 42-02457-302532 A
	:	
v.	:	
	:	Grantsville Sand
COLE PILLING, employed by	:	
TM Crushing,	:	
Respondent.	:	

**DECISION**

Appearances: Jason S. Grover, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;  
Jackie Pilling, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Manning

This case is before me under 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820 (the “Mine Act”). The Secretary proposed civil penalties against Cole Pilling, a former pit manager for TM Crushing, in connection with Citation No. 6425164 and Order No. 6425171. Pilling contested the proposed penalties filed by the Secretary of Labor. The parties introduced testimony and documentary evidence at a hearing held in Salt Lake City, Utah, and submitted post-hearing briefs. I find that Pilling did not commit a 110(c) violation associated with either Citation No. 6425164 or Order No. 6425171. I therefore **VACATE** the 110(c) violations and penalties against Cole Pilling.

**I. DISCUSSION WITH FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

On May 3, 2010, Inspector Curtis Pittman issued Citation No. 6425164 to TM Crushing under section 104(d)(1) of the Mine Act, alleging a violation of section 56.14100(b) of the Secretary’s safety standards. (Ex. G-1). The citation stated that the operator failed to correct, in a timely manner, a soft left brake, missing steps, and a broken backup alarm upon a loader. *Id.* Section 56.14100(b) of the Secretary’s safety standards requires “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.” 30 C.F.R. § 56.14100(b). On the same day, Inspector Pittman also issued Order No. 6425171 to TM Crushing under section 104(d)(1) of the Mine Act, alleging a violation of section 56.14101(a)(2) of the Secretary’s safety standards, which requires that parking brakes hold equipment carrying a typical load upon the steepest grade it travels. 30

C.F.R. § 56.14101(a)(2), (Ex. G-4). The order stated that when tested, the parking brake of a haul truck that was used the day of the inspection failed to hold the empty vehicle. *Id.* TM Crushing did not contest the citation or the order.

After a special investigation, the Secretary charged Cole Pilling with two 110(c) violations concerning the conditions documented in Citation No. 6425164 and Order No. 6425171. The Secretary proposed penalties for the 110(c) violations of \$2,300.00 for Citation No. 6425164 and \$3,100.00 for Order No. 6425171.

I reject the Secretary's assertion that Pilling violated 110(c)<sup>1</sup> based upon his general knowledge of TM Crushing equipment. The Secretary argues that because Pilling "was on notice of problems with the equipment generally" he had knowledge of the ineffective parking brake of a haul truck as well as an ineffective left brake, missing step, and inactive back up alarm of a loader. (Respondent's Br. at 11). A history of varied conditions upon various pieces of equipment does not put an operator's agents on notice of every violation that may occur. Pilling, however, used his general knowledge to attempt to address the problems at TM Crushing by performing frequent repairs, lobbying ownership to purchase better equipment, and examining equipment himself. (Tr. 80, 101). A mechanic was at Gransville Sand almost daily repairing equipment. (Tr. 79). Pilling could not prevent the cited conditions from occurring or predict

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<sup>1</sup> The Commission summarized the law applicable to a Section 110(c) violation as follows:

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

*Cougar Coal Company*, 25 FMSHRC 513, 516 (Sept. 2003).

which condition might occur next, if any. Although Pilling knew that TM Crushing's old equipment posed a risk of developing conditions that violate the Secretary's safety standards, he addressed that risk with his best efforts; he was not "willfully ignorant" of the conditions and he did not know or have reason to know of the conditions cited in Citation No. 6425164 and Order No. 6425171 based upon his general knowledge of TM Crushing's equipment. *See Freeman United Coal Min. Co.*, 108 F.3d 358, 363-64 (D.C. Cir 1997). General knowledge that equipment is old and frequently requires repair does not rise to the level of aggravated conduct.

The secretary failed to show that Pilling's actions relating to Citation No. 6425164 constituted greater than ordinary negligence.<sup>2</sup> The Secretary argues that the inspector's testimony shows that Pilling knew of the cited violation and was guilty of aggravated conduct. I find that the Secretary did not fulfill his burden to show that Pilling knew or had reason to know of the cited conditions that violated section 56.14100(b).<sup>3</sup> I credit Pilling's testimony that he had no knowledge of the conditions cited in Citation No. 6425164; no employee told Pilling that the loader was defective and Pilling did not operate or examine the loader prior to the inspection. (Tr. 92-93). Pilling, furthermore, was not the on-site foreman of the Grantsville Sand Pit; he oversaw three pits and was present at Grantsville only about two days each week. (Tr. 48, 76). Brannigan Hunter, the on-site foreman of Grantsville Pit, testified that he did not know of the conditions and therefore did not inform Pilling of their existence. (Tr. 120). Although the Secretary argues that Inspector Pittman testified and Pilling admitted that he referred to the brakes as "soft," the inspector was not certain that Pilling intended the word "soft" to mean broken or hazardous. (Tr. 47-48). I credit Pilling's testimony that he believed that the brake felt a little different than brakes on other loaders but that he did not believe that the left brake was a defective, hazardous, or violative condition. (Tr. 94). The loader was frequently repaired during this period. (Tr. 79). Pilling had no information or knowledge that indicated he knew or had reason to know of the cited conditions. His actions did not exhibit aggravated conduct or greater than ordinary negligence. The 110(c) matter relating to Citation No. 6425164 is **VACATED**.

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<sup>2</sup> Pilling argues that the Secretary did not establish a violation of section 56.14100(b) because he did not show that the left brake of the loader was defective or that the cited condition existed from 2009 to 2010. I credit the inspector's testimony that the left brake was defective. Any of the cited problems, including a brake that functioned but was not in perfect condition, affect safety. I credit the inspector's testimony that he issued Citation No. 6425164 because the cited vehicle had several violations, but was in use. As the equipment was used before these conditions were corrected, the conditions were not corrected in a timely manner to prevent the creation of a hazard to persons. Moreover, TM Crushing did not contest the violation, which suggests that Citation No. 6425164 represents a violation of section 56.14100(b).

<sup>3</sup> In order to find individual liability in a 110(c) action, the Secretary bears the burden to show by a preponderance of the credible evidence that the conduct at issue was aggravated. *Maple Creek Mining*, 27 FMSHRC 555, 570 (2005).

The Secretary did not fulfill his burden to show that Pilling knew or had reason to know of TM Crushing's violation cited in Order No. 6425171.<sup>4</sup> The Secretary again argues that the inspector's testimony shows that Pilling knew of the cited violation and was guilty of aggravated conduct. When asked if Pilling's personal conduct, apart from the conduct of the entity of TM Crushing, was aggravated, the inspector only testified that Pilling was "part of the entity" and had "some culpability." (Tr. 53). The inspector seemed to attribute the negligence of the entire entity of TM Crushing to Pilling, which does not show that Pilling had any knowledge of the violation or was guilty of aggravated conduct under 110(c). *Charles Clevinger*, 26 FMSHRC 485, 500 (Oct. 2004) (ALJ). Furthermore, I credit Pilling's testimony that he believed that the parking brake was not defective. (Tr. 102). Although he noted that the preshift examination document for the cited equipment referenced a weak parking brake, Pilling tested the brake and reasonably believed in good faith that it functioned properly. *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1150 (Oct. 1998), (Tr. 97-98, 102-03). I conclude that Pilling tested the parking brake upon a grade that was lower than the steepest that it traveled. The parking brake was effective during this test so it did not alert Pilling to the fact that the brake was defective. Pilling genuinely believed that the parking brake worked. An insufficient examination of equipment may be negligent, but it is ordinary negligence and not aggravated conduct. The Secretary did not fulfill his burden to prove that Pilling knew or had reason to know of the cited condition. The 110(c) matter relating to Order No. 6425171 is therefore **VACATED**.

The Secretary failed to establish that Pilling acted with aggravated conduct that was greater than ordinary negligence with respect to either Citation No. 6425164 or Order No. 6425171. *Beth Energy Mine, Inc.*, 14 FMSHRC 1232, 1245 (1992). Although some of Pilling's actions may have been negligent, the Secretary presented scant evidence and made no showing that Pilling "knowingly violated" the safety standards. *Id.*

## II. ORDER

For the reasons set for above, the 110(c) violations and penalties based upon the underlying facts of Citation No. 6425164 and Order No. 6425171 are hereby **VACATED**. This case is hereby **DISMISSED**.

/s/ Richard W. Manning  
Richard W. Manning  
Administrative Law Judge

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<sup>4</sup> I find, for the purposes of this hearing, that Order No. 6425171 was a violation of section 56.14101(a)(2). I credit Inspector Pittman's testimony regarding this matter. Pilling did not argue the contrary and TM Crushing did not contest Order No. 6425171.

Distribution:

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# **ADMINISTRATIVE LAW JUDGE ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

Office of Administrative Law Judges  
1331 Pennsylvania Avenue, N.W., Suite 520N  
Washington, D.C. 20004

October 25, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2012-664
Petitioner,	:	A.C. No. 46-01602-278315
v.	:	
	:	
	:	
GREYEAGLE COAL COMPANY,	:	
Respondent.	:	Mine: Mine #1

**ORDER TO COMPEL RESPONSE TO SECRETARY OF LABOR’S INTERROGATORIES AND DOCUMENT REQUESTS**

This case is before me upon the March 19, 2012, Petition for the Assessment of Civil Penalty the Secretary of Labor (“Secretary”) filed pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. Chief Administrative Law Judge Robert J. Lesnick assigned this case to me on December 7, 2012, and attached a copy of my Prehearing Order. The Secretary has filed a motion to compel, and Greyeagle Coal Company (“Greyeagle Coal” or “Respondent”) filed a response.

**I. PROCEDURAL HISTORY**

The Secretary’s petition seeks a \$4,592.00 civil penalty assessment against Greyeagle Coal for two alleged violations of safety and health regulations at Mine #1. (Pet. at 1–3, Ex. A.) On February 28, 2013, counsel for the Secretary, Benjamin Chaykin, filed a Motion to Compel (“Mot.”), asking that I require Greyeagle Coal to “provide complete, verified answers” to his First Set of Interrogatories and First Request for Production.<sup>1</sup> (Mot. at 1.)

At my direction, Law Clerk Paul Veneziano held a conference call with Messrs. Chaykin and Phillips to attempt an amicable resolution to the Secretary’s motion. Based on this call, Mr. Chaykin agreed to allow Mr. Phillips until March 22, 2013, to supplement Greyeagle Coal’s discovery responses or file a Response in Opposition to the Secretary’s Motion to Compel. On March 25, 2013, Mr. Chaykin informed Mr. Veneziano that the Secretary wished to proceed with the pending motion to compel. That same day, Mr. Chaykin e-mailed Mr. Phillips, indicating that he believed “more information was required” and detailing areas he felt were deficient. On

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<sup>1</sup> Counsel for the Secretary, Benjamin Chaykin, served the Secretary’s First Set of Interrogatories and First Request for Production on August 8, 2012. Greyeagle Coal’s counsel, Jeffrey Phillips, served answers and responses to the interrogatories and request for documents on September 7, 2012, and supplemented the response on October 24, 2012. On February 8, 2013, Mr. Chaykin outlined what he saw as deficiencies in the responses and supplements. Greyeagle Coal also made supplementary responses on March 22, March 27, and April 11, 2013.

April 5, 2013, Mr. Chaykin filed the Secretary's Renewed Motion to Compel ("Mot. II"), and Greyeagle Coal filed its Response to Secretary's Renewed Motion to Compel on April 12, 2013 ("Resp. to Mot.").

## II. ISSUES

### A. Factual Background

According to the Secretary, the citations in this case —

were issued in connection with MSHA's investigation of a July 11, 2011 methane explosion accident at Mine No. 1's Return Air Shaft. Reportedly, Greyeagle was informed by a WV OMHST inspector that metal grating over the Return Air Shaft at Mine No. 1 needed to be repaired to prevent persons from falling into the shaft. Greyeagle directed two miners (Dewayne Marcum and James Branham) to perform welding to repair this grating. . . . Then, an explosion occurred due to the ignition of methane emanating from the return mine shaft, throwing Marcum and Branham a distance of approximately thirty-five (35) feet due to the force of the explosion.

(Mot. at 1–2.) The Mine Safety and Health Administration ("MSHA") issued two citations alleging "significant and substantial" ("S&S")<sup>2</sup> violations of the Secretary's safety and health regulations and characterizing Greyeagle Coal's violative conduct as highly negligent in one case and moderately negligent in the other. (Mot. at 1–2; Citation No. 8116915; Citation No. 8116916.)

One of the welders, Marcum, has also filed a civil suit in West Virginia state court for injuries he claims to have suffered when the mine's methane exploded as he completed welding work to repair the mine shaft's metal grating. (Mot. II at 3, Ex. C.)

### B. Issues To Be Decided

The Secretary contends that Greyeagle Coal's responses to Interrogatory Nos. 2, 4, 6, and 9 and Document Request No. 2 are insufficient. (Mot. II at 1–3.)<sup>3</sup> Greyeagle Coal, however,

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<sup>2</sup> The S&S terminology derives from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

<sup>3</sup> The Secretary also requests that I compel Greyeagle Coal to provide contact information for "all persons with knowledge of the cited condition," including Marcum and Branham (Mot. II at 2), but I note Greyeagle Coal's April 11 supplement provided contact information for all of the individuals listed in its responses to Interrogatory Nos. 9 and 11, including Marcum and Branham. (*Id.* at 5, Ex. 2.)

claims its “discovery answers are reasonable and appropriate” given the proposed penalty and issues presented in this case. (Resp. to Mot. at 7.) Notably, however, Greyeagle Coal makes no mention of an undue delay to the progress of this case.

Based on the parties’ arguments, the following issues<sup>4</sup> are before me: (1) whether Greyeagle Coal must identify the Greyeagle or Alpha Natural Resources<sup>5</sup> employee or employees who assigned Marcum and Branham to perform welding work at the accident site; (2) whether Greyeagle Coal must identify documents responsive to Interrogatory Nos. 2, 4, and 6; (3) whether Greyeagle Coal must identify and produce documents relating to Marcum’s civil lawsuit; and (4) whether Greyeagle Coal must produce documents relating to the deficiency of the mine shaft grating, work orders or related records of work assignments to welding employees to repair the grating, internal documents or notes relating to the accident at issue, or internal documents or notes relating to MSHA’s investigation of the accident and issuance of Citation Nos. 8116915 and 8116916.

### III. PRINCIPLES OF LAW

#### A. Scope of Discovery

Commission Procedural Rule 56 allows parties to use depositions, written interrogatories, requests for admissions, and requests for documents or objects to obtain discovery of “any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.”<sup>6</sup> 29 C.F.R. §§ 2700.56(a)–(b). A party served with

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<sup>4</sup> In their filings, both the Secretary and Greyeagle Coal discuss the jurisdictional assertions Greyeagle Coal included in its Answer and Interrogatory and Request responses. (Answer at 3; Mot. I at 3; Resp. to Mot. at 2, 5; Mot. II at Ex. A.) I note that MSHA has a Mine ID assigned to Greyeagle Coal’s Mine #1, and the body of the citations suggest that Marcum and Branham were working onsite. To date, Greyeagle Coal has made no motion to dismiss this case for lack of subject matter jurisdiction. In fact, Greyeagle Coal’s own filing denies any reliance on jurisdiction as a basis for refusing to provide the requested materials. (Resp. to Mot. at 5.) Thus, I need not determine whether MSHA properly exercised jurisdiction.

<sup>5</sup> According to Greyeagle Coal’s March 22 supplement, Alpha Natural Resources “assumed control of the Greyeagle Coal Company in a merger with Massey Energy Company on June 1, 2011 . . . .” (Mot. II at Ex. A.)

<sup>6</sup> Federal Rule of Evidence 401 defines evidence as relevant if it “has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.” Fed. R. Evid. 401. The Federal Rules of Evidence are not mandatory in Commission hearings but may “have value by analogy.” *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1136 n.6 (May 1984). If anything, the definition of “relevance” in the scope of discovery is broader than “relevance” for the admittance of evidence at trial. *See In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1189–93 (10th Cir. 2009) (discussing the meaning of relevance in the scope of discovery). Thus, evidence that would be considered relevant under the Federal Rules of Evidence will satisfy the definition of relevance for the purpose of discovery.

interrogatories and requests for production must answer within 25 days of service and must state the basis for any objections in its answer. 29 C.F.R. §§ 2700.58(a), (c).

For procedural questions “not regulated by the [Mine] Act, [the Commission’s] Procedural Rules, or the Administrative Procedure Act,” the Federal Rules of Civil Procedure guide Commission Judges as “far as practicable.” 29 C.F.R. § 2700.1(b). Guidance, though, does not require strict adherence. *See Rushton Mining Co.*, 11 FMSHRC 759, 765 (May 1989) (observing “[Commission] Procedural Rule 1(b) reserves to the Commission considerable discretion in deciding whether and to what extent it is to be ‘guided’ by a particular Federal Rule of Civil Procedure.”)

Like the Commission’s rules, the Federal Rules of Civil Procedure establish a broad discovery regime. *See Schlagenhauf v. Holder*, 379 U.S. 104, 114–15 (1964) (“We enter upon determination of this construction with the basic premise ‘that the deposition-discovery rules are to be accorded a broad and liberal treatment’ to effectuate their purpose that ‘civil trials in federal courts no longer need to be carried on in the dark.’”) (quoting *Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947)). Notwithstanding recent changes intended to involve courts’ fine tuning of overabundant discovery, Federal Rule 26(b)(1) continues to authorize parties to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location or persons who know of any discoverable matter.” Fed. R. Civ. P. 26(b)(1). Like the Commission’s rules, the Federal Rules’ regime also specifies that “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to discovery of admissible evidence.” *Id.*

## B. Limitations on Discovery

### 1. Undue Burden or Expense

Commission Judges may “limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense” for “good cause shown.”<sup>7</sup> 29 C.F.R. § 2700.56(c). The Commission has not defined “good cause” or “undue delay,” but Commission Judges have relied on Commission Rule 56(c) to limit needless, hypothetical, or unrelated discovery. *See Marfork Coal Co.*, 28 FMSHRC 742, 743 (Aug. 2006) (ALJ) (limiting “needless

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<sup>7</sup> Although Greyeagle Coal points to the standard outlined in Federal Rule 26(b)(2)(C), I note that the Commission Rules and Federal Rules are in tension regarding the limitation of burdensome discovery: whereas Commission Rule 56(c) is permissive, Federal Rule 26(b)(2)(C) is mandatory. *Compare* 29 C.F.R. § 2700.56(c) (“Upon motion by a party or by the person from whom discovery is sought or upon his own motion, a Judge *may* . . . limit discovery . . . .”) (emphasis added) *with* Fed. R. Civ. P. 26(b)(2)(C) (“On motion or on its own, the court *must* limit the frequency or extent of discovery . . . .”) (emphasis added). Because Commission Rule 56(c) specifically regulates the procedural question of limiting discovery on the basis of an undue burden, I need not apply the Federal Rule. However, as with the Federal Rules of Evidence, I find Federal Rule 26(b)(2)(C) valuable by analogy.

discovery” in the interest of efficient use of judicial resources and avoiding undue burden or expense where contest cases had been stayed pending civil penalty proceedings and settlement discussions might obviate the need for discovery); *Eagle Energy, Inc.*, 21 FMSHRC 109, 113 (Jan. 1999) (ALJ) (refusing request for *in camera* review of documents claimed to be protected by the work product doctrine where requesting party made no “threshold showing identifying the nature of the information to be discovered.”); *Newmont Gold Co.*, 18 FMSHRC 1709, 1713–14 (Sept. 1996) (ALJ) (limiting the scope of permissible deposition questions to prevent “broad, complicated, or lengthy hypothetical questions of . . . witnesses that do not relate directly to the facts at issue . . .”). However, a party objecting to a discovery request on the basis of burden or expense must demonstrate such a burden or expense. *Rail Link, Inc.*, 20 FMSHRC 181, 182–83 (Jan. 1998) (ALJ) (rejecting a motion for a protective order because the Secretary failed to show the deposition sought would expose the witnesses or MSHA to an undue burden); *Newmont Gold Co.*, 18 FMSHRC 1304, 1306–07 (July 1996) (ALJ) (refusing to protect certain MSHA officials from deposition because the information sought from those officials was very specific, meaning the depositions would be short and not overly burdensome); *Hays v. Leeco, Inc.*, 12 FMSHRC 907, 908 (Apr. 1990) (ALJ) (finding the benefit of a site visit outweighed the cost to the operator of “several man hours” spent escorting complainant’s attorney around the mine site).

## 2. Privileged Documents

Commission Rule 56(b) excludes privileged material from the scope of discovery. *See* 29 C.F.R. § 2700.56(b). Parties objecting to interrogatories and requests for documents must “state the basis for the objection” in its answer or response. 29 C.F.R. § 2700.58(a), (c). The Federal Rules also limit discovery to “nonprivileged” matter.<sup>8</sup> Fed. R. Civ. P. 26(b)(1). However, parties withholding otherwise discoverable information or documents on the basis of privilege or “protection as trial-preparation material” must expressly make such a claim and “describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5)(A). Blanket or “boilerplate” objections do not satisfy a party’s burden to specify the information or items withheld in a manner enabling other parties to assess the claim. *See Remington, LLC*, 33 FMSHRC 2027, 2029 (Aug. 2011) (ALJ) (noting that “if some of the requested information is privileged the burden is on the party asserting the privilege to identify it” and ordering a response to a request for production where the withholding party provided a boilerplate response stating the request exceeded the scope of Federal Rule of Civil Procedure 26(b) and implicated the attorney-client privilege, the work product privilege, and self-critical examination privilege); *see also Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir.) (“We hold that

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<sup>8</sup> Unlike the “undue burden” rules outlined above, the Commission Procedural Rules do not differ from the Federal Rules regarding the assertion of privilege. Both sets of rules require the withholding party to explain the basis for refusing to comply with discovery; the Federal Rules simply provide more specific details about what the withholding party must do to effectively assert a claim of privilege. Accordingly, the Federal Rules requirement that withholding parties describe the documents, communications, and tangible thing not produced informs what is required under the Commission Rule.

boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege.”), *cert denied*, 546 U.S. 939 (2005).

#### IV. ANALYSIS & DISCUSSION

##### A. Scope of Discovery

Each of the Secretary’s Interrogatories and Requests relates to the parties or actors involved in the accident underlying the two citations before me in this case. Moreover, each response may shed light on the parties’ claims and defenses. First, Interrogatory No. 6 specifically requests that Greyeagle Coal identify any person with knowledge of facts pertaining to the degree of negligence attributable to the operator for each contested citation. Despite Greyeagle Coal’s contention that Gary Hatfield advised Greyeagle Coal personnel to complete the welding work (Resp. to Mot. at 5), the identity of the Greyeagle Coal or Alpha Natural Resources employee(s) who instructed Marcum and Branham to complete these repairs is relevant and will very likely bear on any such determination.<sup>9</sup> *See, e.g., Wayne Supply Co.*, 19 FMSHRC 447, 451–53 (Mar. 1997) (refusing to impute a miner’s conduct to the operator where the miner was not a supervisory employee). This identifying information will also allow the Secretary to depose the witness or witnesses, which may lead to a fuller presentation of the facts in this case.

Likewise, Interrogatory Nos. 2, 4, and 6 request Greyeagle Coal to identify documents that reference or relate to facts regarding the cited violations at issue, the S&S designations for those citations, and the degree of negligence attributable to the operator, respectively. Each of these subjects will be relevant to any penalty I assess. Indeed, they underlie the factual burdens that will be at issue at hearing. Identifying these documents may also allow the Secretary to specifically request the documents and elicit relevant testimony during deposition or at hearing, again leading to a fuller presentation of the facts underlying the citations in this docket.

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<sup>9</sup> Greyeagle Coal’s Response suggests that it has properly provided this information, “expressly stat[ing] that Gary Hatfield advised Greyeagle Coal Company personnel to complete the work that was earlier ordered to be done by the West Virginia Department of Environmental Protection.” (Resp. to Mot. at 5.) However, according to Greyeagle Coal’s April 11 supplement, “Gary Hatfield was an environmental compliance manager for Rawl Sales & Processing Company.” (*Id.* at Ex. 2.) Yet one of the documents Greyeagle Coal included in its March 27 supplement lists Hatfield as an “Authorized Representative” for Greyeagle Coal, while still another seemingly indicates that Hatfield, Marcum, and Branham were employees of Rawl Sales. (Mot. II. at Ex. C). Greyeagle Coal’s discovery responses and filings, therefore, do not make clear what type of relationship Hatfield or Rawl Sales have with Greyeagle Coal or Marcum or Branham. Even assuming Hatfield, Marcum, and Branham are each Rawl Sales employees, Greyeagle Coal’s answer to the interrogatory *does not* specify which of *its* employees or its parent’s employees instructed or authorized Marcum and Branham to complete the welding work.

The documents related to Marcum’s civil suit are similarly relevant or likely to result in relevant evidence. According to its March 27 supplement, Greyeagle Coal and Hatfield are named defendants in Marcum’s civil suit. (Mot. II at Ex. C.) The depositions, exhibits, and other discovery in Marcum’s case, therefore, seem likely to address many of the same facts underlying the accident that are the bases of the citations before me and the severity of injuries suffered. Moreover, Hatfield—the party Greyeagle Coal specifically identified in its Interrogatory responses as having “advised” Greyeagle Coal personnel to complete the welding work—is also a named party. His depositions or filings, specifically, may clarify his relationship with Greyeagle Coal, his conversations with its employees, and ultimately, the level of negligence attributable to the mine operator in this case. Similarly, these documents may lead to the discovery of relevant evidence in future document requests or depositions in this case.

Finally, the documents related to the grating deficiency, work orders or related records, internal documents or notes relating to the accident at issue, or internal documents or notes relating to MSHA’s investigation of the accident and citations may each relate to the underlying violations themselves, their gravity, or the negligence attributable to Greyeagle Coal. As stated above, these documents may bear upon facts of consequence in the case before me.

Accordingly, the requested information and documents will either be relevant, admissible evidence or likely to lead to discovery of admissible evidence. I therefore conclude that each of the Secretary’s discovery requests at issue fall comfortably within the liberal discovery regimes set out in the Commission Procedural Rules and the Federal Rules of Civil Procedure.

B. Undue Burden

In arguing that the Secretary’s discovery requests are unduly burdensome, Greyeagle Coal makes two arguments. First, it references the proposed penalty of \$4,592.00. Second, Greyeagle Coal notes that it has supplemented its responses four times and contends the Secretary “has belabored the alleged discovery dispute long enough.” (Resp. to Mot. at 6.) In its responses to Interrogatory Nos. 2, 4, and 6, Greyeagle Coal also included: “OBJECTION. This interrogatory exceeds the scope of discovery authorized by Rule 26 of the Federal Rules of Civil Procedure. It is overbroad [and] unduly burdensome . . . .” (Mot. II at Ex. A.)

However, nowhere does Greyeagle Coal detail the burden or expense involved in responding to the Secretary’s discovery requests. Indeed, Greyeagle Coal provides *no* specifics about the burden or expense involved in identifying the Greyeagle or Alpha Natural Resources employee or employees who assigned or approved Marcum and Branham’s welding work at the accident site, identifying documents responsive to Interrogatory Nos. 2, 4, and 6, or producing documents regarding the grating deficiency, work orders or related records, internal documents

or notes relating to the accident at issue, or internal documents or notes relating to MSHA's accident investigation and citations.<sup>10</sup> Lacking any details regarding the costs or burdens of producing this information, I therefore determine that Greyeagle Coal has not demonstrated an undue burden or expense for any of these three types of requested items.

Similarly, Greyeagle Coal's bald contention that it is unduly burdensome or expensive to identify and produce relevant documents and discovery responses related to Marcum's West Virginia civil suit does not demonstrate an undue burden or expense. Marcum's case involves both Greyeagle Coal and Hatfield. Though Greyeagle Coal provides no details regarding the costs it would incur in responding to this request, it *does* point to the size of the proposed penalty and the Secretary's ability to order depositions transcripts from the court reporter. Greyeagle Coal also argues that it "should not be forced to expend time and money having counsel in this case (who is not counsel in the Bruce Marcum lawsuit) review the entire file of the civil lawsuit, determine what is 'relevant' to this instant MSHA case and produce that information, at the Respondent's own cost and expense." (Resp. to Mot. at 7.) Given the juxtaposition, Greyeagle Coal might be implying that the costs of producing these documents amounts to some significant portion of the \$4,592.00 proposed penalty.

Granted, having a second law firm review the case file for the Marcum civil case may be an added expense. Nevertheless, it is unclear why Greyeagle Coal believes it should be exempt from turning over these documents simply because Greyeagle does not wish its counsel to spend time and money reviewing its own files from the Marcum civil suit. Greyeagle Coal is entitled to employ more than one attorney or one firm; that it chose to do so, however, does not free Greyeagle Coal from its discovery obligations. Under the Commission Procedural Rules, parties have a duty to provide requested documents. These same Procedural Rules permit me to limit discovery when a party has demonstrated undue burden or expense, but I do not need to limit discovery simply because a party will expend additional time and money having a different attorney get up to speed on the documents in its possession and with which another retained attorney is already familiar. *Cf. Burns*, 164 F.R.D. at 592-93 (rejecting party's objections to discovery as overbroad, vague, and unduly burdensome because they were not sufficiently specific and characterizing the "considerable time, effort and expense consulting, reviewing and analyzing 'huge volumes of documents and information'" involved in "answering the interrogatories" as "an insufficient basis to object.") In this case, Greyeagle Coal has simply failed to demonstrate that having its attorneys review files already in its possession is an undue burden or expense.

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<sup>10</sup> I note that Greyeagle's answer to Document Request No. 2 also objected to the request as "exceeding the scope of discovery authorized by Rule 26 of the Federal Rules of Civil Procedure" and characterized the request as "vague and ambiguous as 'logbook entries' are undefined." (Mot. II at Ex. A, Ex. C.) Yet, the Secretary's March 25, 2013, e-mail to Greyeagle's counsel outlined the type of documents the Secretary sought. (Mot. II at Ex. D.) Greyeagle's Response to the Secretary's Renewed Motion to Compel, however, does not explain how this request is unduly burdensome or expensive.

Even under the standard for limiting discovery outlined in Federal Rule 26(b)(2)(c), I would not be required to limit the Secretary's requested discovery in this case.<sup>11</sup> I am unable to weigh meaningfully the cost and likely benefits of the requested discovery because Greyeagle Coal provided no details regarding the burden or expense involved in providing the requested information. Moreover, Greyeagle Coal provided neither specifics to establish the discovery sought was unreasonably cumulative nor details regarding more convenient, less expensive or less burdensome alternative sources to obtain the requested information.<sup>12</sup>

Finally, though I recognize that counsel for Greyeagle Coal has made four supplemental responses to the Secretary's requests, a party's burden to respond to discovery is not incremental or optional. It is unclear why Greyeagle Coal would spend time making four separate responses when the materials the Secretary seeks in this motion to compel were described by the Interrogatories and Requests. Perhaps Greyeagle Coal hoped its seriatim responses would satiate

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<sup>11</sup> Federal Rule 26(b)(2)(C) requires courts to "limit the frequency or extent of discovery otherwise allowed" if the court determines:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefits, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C). The totality of the circumstances determines whether to limit discovery. *See, e.g., Patterson v. Avery Denison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002). A party objecting to the breadth of discovery on the basis of disproportionate burden or expense must specifically demonstrate such a burden or expense. *See, e.g., Sullivan v. StratMar Sys., Inc.*, 276 F.R.D. 17, 19–20 (D. Conn. 2011) (rejecting discovery objection where the party "merely declared the cost of producing the requested documents would 'surpass by a large margin any amount [the requesting party] could reasonably hope to recover' in the action, but provided no evidence or details regarding its costs).

<sup>12</sup> Greyeagle Coal provided docketing and court reporter contact information for Marcum's West Virginia civil suit and contends the Secretary would be able to "order the deposition transcripts from the court reporter." (Resp. to Mot. at 6–7, Ex. 1.) However, Greyeagle Coal's argument conspicuously ignores the "discovery responses, documents, [and] witness statements" related to Marcum's civil suit that the Secretary requested. (*Id.* at 6–7.) The court reporter, therefore, would not be an alternative source for those documents, let alone a more convenient, or less burdensome or expensive one. Greyeagle Coal also failed to demonstrate how or why simply having Greyeagle Coal provide copies of the deposition transcripts would be inconvenient, burdensome, or expensive.

the Secretary without incurring the expense required to respond fully. They did not. Regardless, Greyeagle Coal's four separate discovery supplements do not, in themselves, demonstrate that the Secretary has had an ample opportunity to obtain the information by discovery. I determine that Greyeagle Coal has not demonstrated any of the three prongs outlined in Federal Rule 26(b)(2)(C), and I conclude that the totality of the circumstances would not require me to limit the Secretary's discovery under the Federal Rules.

For the reasons above, I determine Greyeagle Coal has failed to demonstrate any undue burden or expense. Lacking good cause, I conclude that I need not limit the Secretary's Interrogatories or Document Requests.

### C. Privileged Documents

Interrogatory Nos. 2, 4, and 6 ask Greyeagle Coal to provide factual information regarding several topics, to identify all persons having knowledge about those facts, and to identify all documents that make reference to or in any way relate to those facts. In its answers, Greyeagle Coal objects that each of these interrogatories "implicate[] the attorney-client privilege and work product doctrine."<sup>13</sup> (Mot. II at Ex. A.) Greyeagle Coal's answer to Document Request No. 2 also claims that request "implicates the attorney [sic] client privilege and/or work production doctrine." (*Id.*) In a footnote specifically referencing the Marcum civil suit documents, Greyeagle Coal also indicates: "At least some of these requested documents may be protected by the attorney-client privilege and/or the work product doctrine." (Resp. to Mot. at 7 n.4.) However, in none of these supposed assertions of privilege has Greyeagle Coal provided any details describing "the nature of the documents, communications, or tangible things not produced," let alone done so "in a manner that . . . will enable other parties to assess the claim." *See* Fed. R. Civ. P. 26(b)(5)(A).

Rather than satisfying its burden, Greyeagle Coal has chosen to provide no details regarding any documents it has withheld. Its assertions of privilege epitomize the non-specific,

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<sup>13</sup> I note that Greyeagle Coal provided identically worded objections to Interrogatory Nos. 11 and 12. (Mot. II at Ex. A.) I find the repeated use of this boilerplate language troubling, particularly considering Administrative Law Judge Barbour's rejection of nearly identical language as insufficient to satisfy the burden of asserting the privileges identified. *See Remington, LLC*, 33 FMSHRC 2027, 2029 (Aug. 2011) (ALJ). More troubling still, the firm involved in Judge Barbour's case is the same firm representing Greyeagle Coal in the case before me. The Secretary has not asked that I determine Greyeagle Coal's privileges to have been waived and I am not inclined to do so *sua sponte*. However, counsel for Greyeagle Coal, as well as his firm, should be on notice that failure to properly assert privilege claims may result in a waiver of privilege. *See Burlington N. & Santa Fe Ry. Co.*, 408 F.3d at 1149 (discussing cases and adopting a three part "holistic" test for when a privilege should be waived if a privilege log is not produced); *see also* Fed. R. Civ. P. 26 advisory committee's note (1993 Amendments) (Subdivision (b)) (requiring notification when withholding materials subject to a discovery request on the basis of privilege or work product protection and noting that failure to provide notice may result in Rule 37(b)(2) sanctions and a waiver of the privilege.)

boilerplate recitations that courts disfavor and find insufficiently descriptive to assert a privilege effectively. Without such information, neither the Secretary nor the Court can evaluate the applicability of the claimed privilege or protection. I determine, therefore, that Greyeagle Coal has not properly asserted the claimed privileges.

## V. ORDER

Based on the foregoing reasoning, the Secretary's Renewed Motion to Compel is **GRANTED**. It is hereby **ORDERED** that Greyeagle Coal shall (1) identify the Greyeagle or Alpha Natural Resources employee or employees who assigned, approved, or authorized Marcum and Branham's welding work at the accident site; (2) identify documents responsive to Interrogatory Nos. 2, 4, and 6; (3) identify and produce documents relating to Marcum's civil lawsuit; and (4) produce documents relating to the deficient grate, work orders or related records of work assignments to employees to repair the grating, internal documents or notes relating to the accident at issue, or internal documents or notes relating to MSHA's investigation of the accident and issuance of Citation Nos. 8116915 and 8116916.

WHEREFORE, it is further **ORDERED** that Greyeagle Coal, to the extent it claims any attorney-client privilege or work product doctrine protection, identify any documents withheld and provide sufficient details to permit the Secretary to evaluate the applicability of the claimed privilege or protection.<sup>14</sup>

/s/ Alan G. Paez  
Alan G. Paez  
Administrative Law Judge

Distribution (Via Electronic Mail & U.S. Mail):

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<sup>14</sup> A detailed, document-by-document privilege log may not be required in every scenario. *See* Fed. R. Civ. P. 26 advisory committee's note (1993 Amendments) (Subdivision (b)) (discussing a party's duty to "provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection" but noting "[t]he rule does not attempt to define for each case what information must be provided . . ."). Many courts have nevertheless found them useful. Given the lack of details Greyeagle Coal has provided in "asserting" its privileges and protections thus far, Respondent may be well advised to consider providing a privilege log.

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